

1 MICHAEL P. VERNA (# 84070)
LAWRENCE D. GOLDBERG (# 168142)
2 DANIEL J. ZARCHY (# 306883)
Bowles & Verna LLP
3 2121 N. California Blvd., Suite 875
Walnut Creek, California 94596
4 Telephone: (925) 935-3300
Facsimile: (925) 935-0371
5 Email: mverna@bowlesverna.com
lgoldberg@bowlesverna.com
6 dzarchy@bowlesverna.com

7 Attorneys for
SCOTT'S JACK LONDON SEAFOOD, INC.
8

9 **SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION**
10

11 In the matter of:

12 **VIOLATION REPORT/COMPLAINT FOR**
13 **THE IMPOSITION OF ADMINISTRATIVE**
14 **CIVIL PENALTIES, ENFORCEMENT FILE**
15 **NO. ER2013.009 AND PERMIT FILE NOS.**
16 **1985.019.22A, 1985.019.09B; SCOTT'S JACK**
17 **LONDON SEAFOOD, INC. AND THE PORT**
18 **OF OAKLAND**
19
20
21
22
23
24
25
26
27
28

STATEMENT OF DEFENSE

Accompanying documents:
Declaration of Elizabeth Gallagher;
Declaration of Steven Hanson;
Declaration of Michael P. Verna;
Declaration of Sandré Swanson;
Declaration of Michelle Lewis;
Declaration of Sally Parsons;
Declaration of Gina Longmire;

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND/STATEMENT OF FACTS	4
A. The Pavilion and Its Use	4
B. The 1997 BCDC Permit.....	5
C. The Alleged Violations	7
D. Agreement on Stipulated Penalties	8
E. The Commission Hearing	9
1. The Proceedings.....	9
a. Effects on the Plaza.....	10
b. Delays by BCDC.....	10
c. Amount of the Administrative Civil Penalty	10
d. Appropriate Number of Days Under an Amendment to the Permit.....	10
e. Ongoing BCDC Oversight.....	10
2. Scott's Response to the Commissioners' Concerns.....	10
a. Effects on the Plaza.....	11
b. Delays by BCDC.....	11
c. Amount of the Administrative Civil Penalty	13
d. Appropriate Number of Days Under an Amendment to the Permit.....	14
e. Ongoing BCDC Oversight.....	15
F. Permit Approval From the City of Oakland	15
III. FACTS THAT SCOTT'S ADMITS	16
IV. FACTS THAT SCOTT'S DENIES	18
V. FACTS OF WHICH SCOTT'S HAS NO PERSONAL KNOWLEDGE	19
VI. OTHER FACTS THAT MAY EXONERATE OR MITIGATE/ ADDITIONAL FACTUAL AND LEGAL ARGUMENTS.....	19

1	A.	THE MCATEER-PETRIS ACT	19
2	B.	THE PROPOSED PENALTY IS OUT OF PROPORTION	
3		TO THE HARM	21
4	1.	The Nature, Circumstance, Extent, and Gravity of the	
5		Violation or Violations	21
6	2.	Whether the Violation is Susceptible to Removal or Resolution	26
7	3.	The Cost to the State in Pursuing the Enforcement Action	28
8	4.	With Respect to the Violator, the Ability to Pay	28
9	5.	The Effect on Ability to Continue in Business	30
10	6.	Any Voluntary Removal or Resolution Efforts Undertaken.....	30
11	7.	Prior History of Violations.....	31
12	8.	The Degree of Culpability	32
13	9.	Economic Savings, if any, Resulting From the Violation	32
14	10.	Such Other Matters as Justice May Require	33
15	C.	THE BCDC HAD KNOWLEDGE OF SCOTT'S TECHNICAL PERMIT	
16		VIOLATIONS FOR 16 YEARS AND TOOK NO ACTION. THE BCDC IS	
17		THEREFORE ESTOPPED FROM IMPOSING CIVIL ADMINISTRATIVE	
18		PENALTIES AGAINST SCOTT'S PRIOR TO THE COMMENCEMENT	
19		OF THE ENFORCEMENT ACTION IN 2013.....	33
20	1.	The BCDC Has Waived Its Right to Seek Civil Administrative	
21		Penalties From Scott's Prior to Commencement of the Enforcement	
22		Action in 2013.....	34
23	2.	The BCDC is Barred From Assessing Civil Administrative	
24		Penalties Against Scott's Prior to 2013 Under the Doctrine	
25		of Laches	34
26	3.	The BCDC is Barred From Assessing Civil Administrative Penalties	
27		Against Scott's Prior to 2013 Under the Doctrine of Unclean Hands ...	35
28	D.	AT NO TIME HAS SCOTT'S EVER SUBSTANTIALLY CHANGED	
		THE USE OF THE PAVILION; ANY IMPROVEMENTS TO DATE	
		DID NOT REQUIRE AN AMENDMENT TO ITS PERMIT	35
	1.	The Rule of Lenity	37
	2.	The Alleged Violations Have Been Overcounted.....	40

1	E.	THE STATUTE OF LIMITATIONS HAS RUN.....	42
2	F.	THE PENALTY WILL BE INVALID BECAUSE A HEARING WILL	
3		NOT HELD BEFORE THE FULL COMMISSION WITHIN 60 DAYS	42
4	G.	THE PROCEDURE VIOLATES DUE PROCESS.....	43
5	H.	THE PENALTY IS SIMPLY TOO MUCH	46
6	VII.	CONCLUSION.....	46

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Blain v. Doctor's Co.</i> (1990) 222 Cal. App. 3d 1048, 1059	35
<i>Burton v. Sosinsky</i> (1988) 203 Cal. App. 3d 562, 574	35
<i>CrossTalk Productions, Inc. v. Jacobson</i> (1998) 65 Cal. App. 4th 631, 639	35
<i>Department of Alcoholic Beverage Control v.</i> <i>Alcoholic Beverage Control Appeals Bd.</i> (2006) 40	43
<i>Drake v. Pinkham</i> (2013) 217 Cal.App.4th 400, 406	34
<i>English v. City of Long Beach</i> (1950) 35 Cal.2d 155, 159	43, 44
<i>Fibreboard Paper Products Corp. v. East Bay Union of Machinists</i> (1964) 227 Cal. App. 2d 675, 728	35
<i>Gould v. Corinthian Colleges, Inc.</i> (2011) 192 Cal.App.4th 1176, 1179	34
<i>Hall v. Wright</i> (9th Cir. 1957) 240 F.2d 787, 794-795	35
<i>Howitt v. Superior Court</i> (1992) 3 Cal.App.4th 1575, 1586-1587	44
<i>Johnson v. City of Loma Linda</i> (2000) 24 Cal.4th 61, 68	34
<i>Leocal v. Ashcroft</i> (2004) 543 U.S. 1, 11 n.8	38
<i>Magic Kitchen LLC v. Good Things Internat., Ltd.</i> (2007) 153 Cal.App.4th 1144, 1157	34
<i>Mattco Forge, Inc. v. Arthur Young & Co.</i> (1997) 52 Cal. App. 4th 820, 846	35
<i>Mein v. San Francisco Bay Conservation Etc. Com</i> (1990) 218 Cal.App.3d 727, 732	20

TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
<i>Morongo Band of Mission Indians v. State Water Resources Control Bd.</i> (2009)	45
45 Cal.4th 731, 735	
<i>Moss v. Minor Properties, Inc.</i> (1968)	34
262 Cal.App.2d 847, 857	
<i>Nightlife Partners, Ltd. v. City of Beverly Hills</i> (2003)	44, 45
108 Cal.App.4th 81, 93, 98	
<i>Pineda v. Bank of America, N.A.</i> (2010)	42
50 Cal.4th 1389, 1395-1396	
<i>Precision Co. v. Automotive Co.</i> (1945)	35
324 U.S. 806, 814-815	
<i>Quintero v. City of Santa Ana</i> (2003)	44, 45
114 Cal.App.4th 810, 812, 815	
<i>Roesch v. De Mota</i> (1944)	34
24 Cal.2d 563, 572	
<i>San Bernardino Valley Audubon Society v. City of Moreno Valley</i> (1996)	34
44 Cal.App.4th 593, 605	
<i>United States v. Bass</i> (1971)	37, 38
404 U.S. 336, 347	

STATUTES

	<u>Page</u>
Clean Water Act § 404	38
14 Cal. Code Reg. Section 10125(b)	<i>passim</i>
14 Cal. Code. Regs. §§ 11324, 11326	45
California Government Code Section 66600.....	20
Gov. Code § 66601	38
Cal. Govt. Code § 66602	20
California Government Code § 66605.1	5, 21
Cal. Govt. Code § 66632(a)	<i>passim</i>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES (Cont.)

	<u>Page</u>
California Government Code Section 66641.9(a)	21
CCP § 340(b)	42
Government Code § 66641.5(a)-(e)	<i>passim</i>
Gov. Code § 66641.6	43
Gov. Code § 11425.10 (Administrative Adjudication Bill of Rights)	43
Gov. Code, § 11430.10 et seq.	45
McAteer-Petris Act	<i>passim</i>

1 **I. INTRODUCTION**

2 Fining Scott's Jack London Seafood, Inc. ("Scott's") a total of \$841,180 for a handful of purely
3 technical violations that had no impact whatsoever on the bay or the public's access to the waterfront is
4 ridiculous. This penalty is by far the highest issued for a non-environmental, non-wildlife habitat, non-
5 bay related violation in the 50+ year history of the BCDC. Before this violation report was issued, the
6 largest penalty for a non-environmental technical violation was \$45,000 (City of Redwood City in
7 2001; Declaration of Michael P. Verna ("Verna Dec.") at ¶ 5, Exh. D.). Notwithstanding, Scott's and
8 BCDC staff and the Enforcement Committee agreed to a civil penalty of \$250,000 in a Stipulated Cease
9 and Desist Order a couple of months ago—over five times higher than any previous non-environmental
10 penalty—just in an effort to avoid this madness. But apparently, that still wasn't enough, as staff's and
11 Enforcement Committee's recommendation to agree to the Stipulation was rejected by the full
12 Commission on November 3, 2016.

13 So what is it that Scott's has done to warrant such a historically high and over charged civil
14 penalty? Has it polluted the bay? Has it altered or disturbed water flows into or out of the bay? Has it
15 blocked public access to the waterfront? Has it completely ignored the BCDC permit process in
16 making upgrades to the pavilion? Has it misused or neglected the pavilion in a way that has prevented
17 people from enjoying the waterfront?

18 The answer to all of these questions is an unqualified "NO". On the contrary, Scott's has
19 brought hundreds of thousands of people to the pavilion over the last twenty years that would not have
20 otherwise been exposed to Jack London Square and the Oakland waterfront. And they were brought
21 there at Scott's own expense—it has paid every penny to build, maintain, restore, and improve the
22 pavilion. Making the public aware of, and giving them access to, the waterfront is one of the overriding
23 missions of the BCDC. And no one has done this in Oakland (or perhaps anywhere in the Bay Area)
24 more so than Scott's. Yet BCDC staff now wants to risk putting Scott's out of business and shutting
25 down any use at all of the pavilion because of technical permit violations? Absurd.

26 The vast majority of violations cited by BCDC staff in the Violation Report are modest (e.g.
27 failing to provide quarterly event reports, parking a promotional vehicle near the pavilion, not placing
28 signs timely, etc.). So in order to generate as high a civil penalty as possible, staff concocted multiple

1 violations for the same basic offense and multiplied that by the number of years each purported
2 violation occurred. But the problem with this approach is that the BCDC was either well aware of these
3 supposed violations for all of those years or didn't care to ask Scott's to comply with its permit
4 obligations. Indeed, BCDC staff has already conceded, in their written recommendation supporting
5 adoption of the Stipulated Cease and Desist Order, that their "delay in enforcement over the lengthy
6 period of non-compliance" gives Scott's excellent equitable arguments to avoid the civil penalties. Put
7 simply, BCDC never cared about the vast majority of Scott's alleged technical permit violations since
8 the permit was issued in 1997, so it has waived and is equitably estopped from saying it cares now.

9 Scott's is not a money tree — (Declaration of Elizabeth Gallagher ("E. Gallagher Dec.") at ¶¶
10 32-35, Exhs. E, E-F) summarizes the narrow profit margins Scott's has eked out from pavilion use over
11 the years (e.g., approximately 4.65% on average from 2008 to 2016). In addition to the "private"
12 functions, Scott's has used the pavilion for charitable/public community functions. Scott's has hosted
13 fewer than 73 days of purely private events per year at the pavilion for the past 6 years, with
14 charitable/public community events making up the remainder. The permit allows 73 days of "private"
15 use without ever defining the term "private." BCDC authored the permit, not Scott's, so BCDC bears
16 the burden of explaining any ambiguity of the term "private" before it seeks to enforce that ambiguity.
17 Logically, the term "private" means "for profit, purely private" events; not charitable/public community
18 events that generate little or no profit. By imposing an inordinate civil penalty for excessive usage,
19 however, BCDC staff is essentially saying that Scott's should be fined for hosting charitable public
20 community events at the pavilion. How does that make any sense?

21 At its core, the Violation Report against Scott's cites three modest transgressions: (1)
22 unpermitted construction of improvements to the pavilion (that BCDC staff had prior notice of and
23 hearings on, and largely approved); (2) supposed overuse of the pavilion for "private" events, and
24 failing to report all of the events, even though Scott's did not exceed its 73 day annual allotment of
25 purely private, for profit events for the last 6 years; and (3) an assortment of very minor technical
26 violations that haven't impacted the bay in the slightest and are easily remedied (i.e. installing signs,
27 more tables and chairs, etc.), even though the BCDC knew of these issues for years and never objected.

28 //

1 //

2 Scott's has tried to work out this dispute with BCDC staff in good faith. But the BCDC appears
3 more interested in illegal and unwarranted retribution. For no apparent reason, BCDC staff has now
4 assessed a civil penalty of \$841,180 against Scott's for the exact same violations they recommended
5 two months ago be assessed for \$250,000 in the Stipulated Cease and Desist Order. How can this
6 possibly be supported? What new "facts" has BCDC staff learned about these violations that warrant
7 more than a threefold increase in the civil penalty? And more significantly, how does this advance the
8 public interest?

9 For over thirty years, Scott's has been bringing people to Jack London Square. How can the
10 BCDC staff possibly think that penalizing Scott's \$841,180 (a) for improving the pavilion (with quick
11 operating retractable walls to maximize public access to the waterfront) and (b) for hosting a modest
12 number of charitable community events in the pavilion in addition to the 73 days of "private" events,
13 will advance the public interest or BCDC's mission? The public interest is not served by forcing
14 Scott's to shut down in Jack London Square, or to stop using and maintaining the pavilion.

15 The simple fact is that before Scott's built the pavilion, Franklin Plaza was nothing more than a
16 parking lot and garbage storage area. Scott's converted the Plaza into one of the best waterfront event
17 venues in Oakland, which has attracted over 300,000 people over the years. Indeed, Scott's was a
18 catalyst for the redevelopment of Jack London Square as a whole. Pavilion events are held mostly in
19 the evenings, when very few people even go to Franklin Plaza and literally no one is using kayaks or
20 engaging in water-related activities. No views are blocked by the pavilion walls at night as there is
21 seldom anyone in the Plaza in the dark. The unpermitted (but BCDC approved) retractable walls
22 installed in the pavilion by Scott's (at its cost) minimizes the time walls are in place anyway. So again,
23 how is it in the public interest and in furtherance of BCDC's mission to punish Scott's for technical
24 violations which could result in Franklin Plaza returning to its old parking lot, garbage storage self? If
25 Scott's doesn't use the pavilion, no one else will. Without Scott's, the pavilion would have no utilities,
26 fire suppression system, restroom access, furniture, or other facilities. It will become unusable. Is that
27 what BCDC wants?

28 Scott's admits it violated certain provisions of the permit, but these were relatively minor

1 transgressions and are easily remedied. In fact, insofar as the pavilion improvements are concerned,
2 Scott's has already obtained a permit from the City of Oakland approving of this work and allowing it
3 to replace the metal entry door frame with a retractable door frame so that the two offending stanchions
4 can be removed. (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14, Exh. A.) And Scott's is in the
5 process of submitting an application to the BCDC (along with its co-permittee, Port of Oakland) to
6 amend the permit to approve these installations and authorize removal of the metal frame entry
7 doorway, just as the City of Oakland has already approved. Further, Scott's agreed in the Stipulated
8 Cease and Desist Order two months ago—and agrees again—to follow the letter of the permit going
9 forward, so long as the BCDC clarifies inherent ambiguities in permit requirements.

10 So whatever violations have occurred are being resolved. Indeed, as to the pavilion
11 improvements, BCDC will be in control of resolving this by granting Scott's and the Port's application
12 to amend their existing permit. The waterfront and bay have suffered no harm by these violations.
13 BCDC staff have obviously isolated every alleged individual transgression possible over the years in
14 order to maximize the number of supposed violations to arrive at the highest possible penalty—higher
15 by *over eighteen times* than the next highest non-environmental civil penalty ever issued by the BCDC
16 (\$45,000 civil penalty to City of Redwood City).

17 A fine of \$841,180 for what Scott's supposedly has done makes no sense, is an abuse of the
18 BCDC's discretion, is not based on substantial evidence, and is arbitrary, capricious, and punitive.
19 Neither the public, nor the Court, will view this kindly.

20 **II. BACKGROUND/STATEMENT OF FACTS**

21 **A. The Pavilion and Its Use**

22 Scott's Jack London Square Seafood restaurant ("Scott's") is located between Broadway and
23 Franklin Street, in Oakland, California within the Jack London Square development. Scott's is a long-
24 time anchor tenant responsible for consistently drawing tens of thousands of people to Jack London
25 Square every year. (Hanson Dec. ¶ 4; E. Gallagher Dec. ¶ 3.) In fact, commercial development and
26 long-range planning during the early years of Jack London Square's evolution from a forgotten and
27 neglected industrial area to a vibrant commercial and retail setting counted on Scott's substantial and
28 dependable draw of people to its restaurant as an introduction to the rest of Jack London Square.

1 (Hanson Dec. ¶ 4.)

2 In addition to its main restaurant setting, Scott's utilizes private event spaces within the
3 restaurant building and a large event space, known as the pavilion, immediately adjacent to the
4 restaurant within the Franklin Street Plaza (an area within BCDC's jurisdiction). The pavilion is an
5 L-shaped structure that is 40 feet high, and whose roof is supported by two groupings of steel posts in
6 the center. The pavilion was conceived by Ray Gallagher, the Scott's Jack London Seafood's founder
7 and principal, who funded its design and construction. (E. Gallagher Dec. ¶ 2.) Private investment in
8 shoreline development, such as Scott's investment in the pavilion, is statutorily recognized under
9 California Government Code § 66605.1 to be "vigorously encouraged" as a principal means of
10 achieving bay shoreline development and minimizing the resort to taxpayer funds. The pavilion is a
11 perfect example of the type of public/private development that the Legislature has expressly
12 encouraged.

13 All parties to this matter are extremely knowledgeable of the pavilion's history and current
14 status. Missing from the discussions between Scott's and the BCDC about event days, tables and
15 chairs, sliding wall panels and signage, is the tremendous benefit the public has received from the
16 numerous non-profit/charitable events Scott's hosts at the pavilion annually, going back to its
17 construction. These events, for which the BCDC seeks to impose unprecedented civil penalties, are
18 responsible for drawing more people to Jack London Square throughout the calendar year than any
19 other single source within the Jack London Square development and support the goals of the enabling
20 legislation under which the BCDC was created. (Hanson Dec. ¶ 5.)

21 The pavilion under Scott's management (while not particularly profitable as evidenced by the
22 years of profit and loss statements submitted in association with the declaration of Elizabeth Gallagher)
23 has worked tremendously well as a public draw – a key reason to venture down to Jack London Square
24 and to enjoy the bay resource in the first place.

25 **B. The 1997 BCDC Permit**

26 On March 6, 1986, the BCDC issued Permit No. 1985.019 to the Port of Oakland for
27 commercial and recreational development along a six-block-long section of waterfront property
28 between Jefferson and Harrison Streets. (Hanson Dec. ¶ 8, Exh. A.) The permit provided that Franklin

1 Street Plaza between Water Street and San Francisco Bay would become a 20,000 sq. ft. public plaza.
2 On February 13, 1996, Scott's Jack London Seafood Inc. was added as a permittee along with the Port
3 of Oakland and authorized to construct a 4,400-square-foot pavilion on the western edge of the plaza.
4 On July 8, 1997, the permit was split into two separate permits: BCDC Permit No. 1985.019A covers
5 all of Jack London Square except for Scott's restaurant, and BCDC Permit No. 1985.019B covers
6 Scott's Restaurant and the pavilion adjacent thereto. (Hanson Dec. ¶ 9.)

7 On October 7, 1997, the BCDC issued the final amended version of permit number 19-85(B) to
8 Scott's Jack London Seafood, Inc. The permit, which was originally issued on March 13, 1986 and
9 then subsequently amended, granted Scott's permission to 1) use a public access plaza for the periodic,
10 temporary installation and use of a 4,500-square-foot banquet tent as part of Scott's Restaurant through
11 January 15, 1996; 2) construct, use and maintain a 4,400-square-foot, 19 to 40-foot-tall pavilion for
12 shared public and private use; 3) install seating, benches, lighting, and other site furnishings within an
13 existing 20,000-square-foot plaza; and 4) install and maintain signage. (Hanson Dec. ¶ 8, Exh. A.)

14 The permit established that Scott's could use a 4,500-square-foot portion of the plaza to erect a
15 tent and host private events (without defining the term "private"). The permit provides for limitations
16 for set up and take down before and after events. After each event, Scott's is required to restore
17 furnishings. The permit also required that Scott's and the Port of Oakland record a legal instrument to
18 permanently guarantee public access to the area. Scott's does not own the pavilion or the land on which
19 it stands, so dedication is not within Scott's capacity to provide. (Hanson Dec. ¶ 35; E. Gallagher Dec.
20 ¶ 18.)

21 The permit then allowed Scott's to construct (entirely at Scott's expense) a 4,400-square-foot, L-
22 shaped pavilion with a translucent fiberglass roof, three sets of four steel columns supporting a tubular
23 steel truss roof-frame with light fixtures attached providing fifteen vertical-feet clear from the existing
24 plaza, a revised paving pattern using pavers which match existing pavers and reflect the shape of the
25 pavilion, lighting, panel walls with transparent window panels located at the perimeter of the pavilion
26 roof, colorful flags and banners, signage, and tables and chairs for use when private events are not
27 taking place at the pavilion. (Hanson Dec. ¶ 8, Exh. A.)

28 The permit addresses pavilion use by Scott's during the higher public use period (May through

1 October) and the lower public use period (November through April). The permit allows Scott's to hold
2 private events on 73 days per year, and further limits the number of times upon which Scott's events
3 can be on consecutive days, weekdays, and weekends. (Hanson Dec. ¶ 8, Exh. A.) The permit contains
4 no restrictions for charitable/non-profit use of the pavilion and does not expressly allocate Scott's 73
5 private use days to non-profit/charitable events held at the pavilion which serve a public benefit.
6 (Hanson Dec. ¶ 8, Exh. A.) Indeed, the permit states on Exhibit A that 20% of each year's days (73) be
7 allocated for "private use" and 80% (292) allocated for "public use", without ever defining what use
8 constitutes "public" and what use constitutes "private". Scott's submits that community-based,
9 charitable events hosted by Scott's in which members of the public are invited comes within any normal
10 definition of "public" as these are not private, for-profit events.

11 **C. The Alleged Violations**

12 The BCDC has alleged the following categories of violations against Scott's:

13 A. Construction of Unpermitted Development. The unauthorized construction of a metal-
14 framed entry doorway, storage area and stage, wood and metal-framed wall, multiple moveable wall
15 panels and ceiling tracks in the pavilion; roof extension.

16 B. Non-Permit Compliant Use of the pavilion; Event Schedule Reporting, during a 12-year
17 period by:

- 18 1. Providing fewer than 292 public use days per year;
- 19 2. Providing fewer than five public use weekend days and nights (average);
- 20 3. Holding more than four private use weekend days and nights (average);
- 21 4. Holding more than three private use weekend days and nights (average);
- 22 5. Providing fewer than three public use weekend days and nights per month;
- 23 6. Holding more than two consecutive private use days.

24 C. Unpermitted Use of the Franklin and Broadway Street Plazas by placing tents and
25 stanchions, storing event related equipment (including planters), and displaying promotional vehicles.

26 D. Untimely Submittal of Private Event Schedules.

27 E. Failure to dedicate the pavilion public access area prior to commencement of
28 construction [of the pavilion].

- 1 F. Failure to provide all required public access improvements during public use days.
2 G. Failure to obtain plan approval prior to installation of public access improvements.

3 **D. Agreement On Stipulated Penalties**

4 In September 2015, BCDC staff informed Scott's and the Port of Oakland that the Executive
5 Director intended to initiate an enforcement proceeding regarding the numerous violations of the Permit
6 or the Port's Permit, including issues relating to Scott's alleged construction in the pavilion. Scott's and
7 the Port of Oakland requested an opportunity to negotiate a proposed settlement with BCDC that would
8 resolve the permit violations alleged against them; provide for payment of an administrative civil
9 penalty; and specify matters to be addressed by Scott's and the Port of Oakland in applications to
10 amend Scott's permit and the Port's permit, and arrive at a schedule for submitting such applications.
11 (Hanson Dec. ¶ 28.)

12 Scott's and the BCDC had at that time been engaged in negotiations where Scott's sought to
13 amend its permit to allow for the improvements it had made at the pavilion and to remove the metal
14 frame doorway that the BCDC found objectionable. (Hanson Dec. ¶¶ 23-27, Exhs. C-E.)

15 On July 19, 2016, the BCDC's Enforcement Committee, Scott's and the Port of Oakland agreed
16 to settle all violation claims and disputes listed above, subject to review and approval by the
17 Enforcement Committee at a public hearing, and by the full Commission at a public meeting. (E.
18 Gallagher Dec. ¶¶ 25-28; Verna Dec. ¶ 4, Exh. M.)

19 On October 20, 2016, the Enforcement Committee held a noticed public hearing to consider the
20 above-referenced settlement and all comments pertaining to a stipulated Cease and Desist order with
21 civil administrative penalties. After considering staff's presentation, as well as comments provided by
22 Scott's, the Port of Oakland and the public, the Enforcement Committee determined that the
23 recommended stipulated order was an appropriate resolution of the violations of the permit and the
24 McAteer-Petris Act. (Verna Dec. ¶ 7, Exh. Q.)

25 The Enforcement Committee determined that the proposed Order accomplished four major goals
26 of the BCDC with regard to Scott's and the Port of Oakland: (1) removal of certain unauthorized
27 construction at a pavilion by Scott's together with establishment of a regulatory process to consider
28 future permit amendments to authorize modifications to the pavilion and improve public access in Jack

1 London Square's Franklin Street Plaza; (2) payment by Scott's of a lump sum penalty of \$250,000 for
2 claimed violations of the Scott's Permit; (3) obviation of an anticipated vigorously contested
3 administrative enforcement proceeding followed by a court challenge to the Commission's action,
4 which would neither ensure a result that benefits the public as much as the proposed Order, nor include
5 an agreement on the pavilion's future use that is more enforceable than the current permit; and (4)
6 simplification of future authorization of the pavilion for shared public and private use. (Verna Dec. ¶ 7,
7 Exh. Q.) Several additional benefits of the proposed Order, such as a surveillance camera and a shared
8 online calendar to monitor pavilion use favored by the Enforcement Committee would also be
9 implemented. (Verna Dec. ¶ 7, Exh. Q.)

10 Of note, the Enforcement Committee set forth numerous public benefits of its recommended
11 settlement:

12 One benefit of this settlement is that it would avoid a vigorously contested administrative
13 enforcement proceeding that would likely be followed by litigation. **It should be noted**
14 **that only after Scott's commenced construction of the new wall panel structure**
15 **without authorization did BCDC activate an enforcement action, despite staff's**
16 **earlier knowledge that the existing permit requirements were likely being violated.**
17 **This delay in enforcement over the lengthy period of noncompliance prior to May**
18 **2013 could give the Permittees equitable arguments for substantially reducing the**
19 **amount of penalties imposed in a contested proceeding.** Moreover, while BCDC
20 could seek penalties and an order to compel compliance in a contested proceeding, the
21 settlement embodied in the proposed Order addresses issues regarding requested permit
22 amendments and future use of the pavilion that could not be included in a unilateral
23 Commission (or court) order. (Verna Dec. ¶ 7, Exh. Q.) (Emphasis added.)

24 The Enforcement Committee thereafter recommended that the full Commission adopt the
25 Recommended Enforcement Decision on the proposed Stipulated Cease and Desist and Civil Penalty
26 Order No. CCD 2016.03 to Scott's and the Port of Oakland, which included a reasonable settlement of
27 disputed claims and which it believed would result in full compliance with the [Scott's] Permit and the
28 Port's Permit. (Verna Dec. ¶ 7, Exh. Q.)

E. The Commission Hearing

1. The Proceedings

No member of the Enforcement Committee was available to attend the full Commission meeting
on November 3, 2016 to support its recommended settlement noted above. (Verna Dec. ¶ 8, Exh. R.)

1 Absent any reasoned internal support reflecting the Enforcement Committee's time, effort and
2 experience arriving at its recommendation, the Commission rejected the Enforcement Committee's
3 stipulated Cease and Desist settlement with \$250,000 civil penalty from Scott's and the Port of
4 Oakland. (Verna Dec. ¶ 8, Exh. R; E. Gallagher Dec. ¶ 29.) The Commissioners raised a number of
5 concerns at the November 3, 2016 hearing:

6 **a. Effects on the Plaza** Commissioner McGrath raised the concern that when the
7 pavilion is hosting an event and the walls are in place, the area of Jack London Square around the
8 pavilion was uninviting as public space. Commissioner McGrath stated that in his experience going to
9 Jack London Square, there were often no tables or chairs.

10 **b. Delays by BCDC** Certain commissioners acknowledged that the BCDC had
11 taken no action for many years despite the belief that Scott's had allegedly violated certain requirements
12 of their permit. This concern had previously been expressed by the Enforcement Committee.

13 **c. Amount of the Administrative Civil Penalty** Certain commissioners
14 commented that a \$250,000 fine is too low because they believed that Scott's was earning profits of
15 \$800,000 per year from pavilion events (a demonstrably erroneous belief). Others sought a penalty
16 based on a mathematical calculation, rather than an "abstract" number.

17 **d. Appropriate Number of Days Under an Amendment to the Permit** Certain
18 commissioners discussed how many days should be authorized for events and what proportion of those
19 should be private/non-profit. Others wanted the number of event days to be based on a calculation,
20 rather than an "abstract" number. Some commissioners did not believe that the Enforcement
21 Committee's recommended settlement should include a change to the number of days, either because
22 Scott's should not be "rewarded", or because they believed Scott's should submit a separate request for
23 a permit amendment for additional days.

24 **e. Ongoing BCDC Oversight** If a settlement is reached with Scott's and the Port
25 of Oakland, the commissioners wanted a provision inserted into an amended permit requiring Scott's
26 and the Port of Oakland to come back before the BCDC after a set amount of time to revisit the matter.

27 **2. Scott's Response to the Commissioners' Concerns**

28 Scott's respectfully submits the following responses to the points raised by the Commissioners

1 above:

2 **a. Effects on the Plaza** With regard the concern that the area around the pavilion is
3 less inviting when the walls of the pavilion are up, Scott's notes that many of events held at the pavilion
4 are in the evening when foot traffic adjacent to the pavilion and in the plaza is minimal. Further, after
5 dark, the views of water resources are naturally reduced. Not only are views due south of the pavilion
6 entirely unobstructed during events where the walls are up, but access to the water resources to the west
7 of the pavilion are available to any pedestrian by simply walking around the pavilion or around Scott's
8 restaurant. In an area as vast as Jack London Square, any person seeking bay access during pavilion
9 events is not prevented from achieving such access in any way. Certainly there is no evidence that
10 kayakers or other water sport activities are taking place at night and being disrupted by pavilion usage.

11 Further, it is an unrealistic presumption, with the sights, smells and sounds of the bay directly in
12 front of the Jack London Square development, and the subject plaza in particular, that any visitor so
13 inclined would be deprived of access simply because an event was taking place at the pavilion. Not
14 only is such a presumption wholly unrealistic, but absolutely no evidence exists to support such an
15 assertion. The fact is that when no events are taking place at the pavilion, it remains mostly unused.
16 On the other hand, the overwhelmingly positive effect that Scott's use of the pavilion has is to bring
17 tens of thousands of people every year down to the waterfront and plaza area that would not otherwise
18 visit. The net upside is entirely consistent with the goals of the McAteer-Petris Act and any downside
19 has been vastly overstated.

20 With regard to tables and chairs, Scott's has endeavored to return them to the pavilion promptly
21 following events and has observed their limited use by the public in general when present. (Verna Dec.
22 ¶ 8, Exh. R.)

23 **b. Delays by BCDC** With regard to delays by BCDC in permit enforcement
24 against Scott's and the Port of Oakland, Scott's respectfully submits that not only are the vast majority
25 of claimed violations unsupported by the evidence, but BCDC now seeks to put Scott's out of business
26 by counting alleged violations dating back 13 years or more. BCDC never uttered a single word to
27 Scott's or the Port of Oakland that the BCDC had any concerns whatsoever regarding permit violations
28 before taking steps to prepare for enforcement proceedings in 2013. The BCDC's interest arose only

1 when complaints were made regarding Scott's improvements to the pavilion. Such undisputed facts,
2 recognized by the Enforcement Committee, provide Scott's with significant legal defenses (discussed in
3 further detail below) to the unprecedented \$841,180.00 administrative civil penalty it has assessed
4 against Scott's and the Port of Oakland.

5 Notwithstanding BCDC's delay, and after efforts to work with the BCDC to make
6 improvements (without causing a substantial change in the use of the pavilion one iota), Scott's has
7 made great efforts to improve the safety of persons attending events at the pavilion through its actions.
8 Scott's has always understood that its improvements to public access and user enjoyment within the
9 footprint of the pavilion have been viewed favorably by the BCDC. (Hanson Dec. ¶ 22.) For example,
10 the revolutionary individual sliding wall panels represent a vast life/fire safety improvement over the
11 cumbersome and potentially unsafe canvas and plastic wall material previously approved by the BCDC
12 to enclose the pavilion, not to mention a significant reduction in set up and take down time, thereby
13 improving public access. Although Scott's believed that installation of a door frame was consistent
14 with its permit, Scott's has already received approval from the City of Oakland building department to
15 remove it and substitute a different door and panel locking system that does not require a solid frame.
16 (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14, Exh. A.)

17 Further, installation of important utilities by Scott's including fire suppression sprinklers,
18 entirely within the footprint of the pavilion, also improved the public's access, safety, and experience
19 while attending events. (E. Gallagher Dec. ¶ 9.) Concerns raised by the BCDC that Scott's continued
20 to operate the pavilion during discussions and negotiations with the Enforcement Committee on this
21 issue fails to consider the impact a cessation of services within the pavilion would have on the public.
22 Event attendees are also members of the public drawn to Jack London Square and in vastly higher
23 numbers than any other group of evening plaza visitors. (Hanson Dec. ¶ 36.) BCDC's admitted delay
24 actually allowed for the negotiation of a reasonable settlement recommended by the Enforcement
25 Committee; the stipulated imposition of a quarter million dollar civil administrative penalty; and what
26 Scott's understood would be a renewed relationship between the parties going forward. Scott's
27 respectfully requests reconsideration by the Commission of the Enforcement Committee's
28 recommended settlement.

1 **c. Amount of the Administrative Civil Penalty** With regard to the amount of the
2 administrative civil penalty recommended by the Enforcement Committee and rejected by the full
3 commission, it is clear that the Commission did not possess accurate financial numbers concerning
4 Scott's revenue and profit generated by events at the pavilion when it rejected the \$250,000 civil
5 penalty. Scott's has now provided its pavilion event statements dating back to 2006 and its profit and
6 loss statements dating back to 2008 for the Commission's review, which indisputably show very modest
7 profit generated from pavilion events. (E. Gallagher Dec. ¶ 36, Exh. C.)

8 Scott's is informed and believes that based on an off-the-cuff comment by former Scott's
9 employee Steve Fagalde, the Commission believes that Scott's is earning an average of \$800,000 per
10 year in profit from events held at the pavilion. The truth of the matter is that Scott's profit margin on
11 pavilion sales/revenue from 2008 through 2016 is 4.65% (a figure that is in line with restaurants of
12 Scott's type in this area). (E. Gallagher Dec. ¶ 36, Exh. C.)

13 In order to generate \$800,000 in profit per year from the pavilion at a 4.65% profit margin,
14 Scott's would have to sell seventeen million two hundred four thousand, three hundred one
15 (\$17,204,301.00) dollars' worth of food, drinks, and related event charges annually during pavilion
16 events. (E. Gallagher Dec. ¶ 33.) In reality, from 2008 through 2016, Scott's pavilion revenue/sales
17 averaged six hundred sixty thousand nine hundred sixteen dollars and twenty cents (\$660,916.20) per
18 year. At a profit margin of 4.65%, the average annual profit Scott's has derived from its use of the
19 pavilion is only \$30,750.86. (E. Gallagher Dec. ¶ 33, 36, Exh. C.)

20 When held up against Scott's financial records for pavilion profits from 2008 through 2016, the
21 \$841,180.00 administrative civil penalty imposed by the BCDC against Scott's represents **27.35 years**
22 of pavilion profits -- more than all of the profit Scott's has ever made from pavilion sales/revenue since
23 it was built. (E. Gallagher Dec. ¶ 34.) The assumption that the pavilion is a cash cow for Scott's is
24 demonstrably false. Rather, Scott's use of the pavilion serves the greater purposes of the McAteer-
25 Petris Act by bringing people down to the waterfront to enjoy the bay *far more* than it serves to enrich
26 Scott's itself. Further, Scott's use of the pavilion to host numerous charitable, non-profit-generating
27 events annually provides a unique and beneficial resource to the community of which Scott's is a long-
28 time member and is proud to support. (Declaration of Sandré Swanson; Declaration of Michelle Lewis;

1 Declaration of Sally Parsons; Declaration of Gina Longmire.)

2 **d. Appropriate Number of Days Under an Amendment to the Permit**

3 In response to certain Commissioners' concern that the number of event days should be more
4 specifically stated (e.g. how many total event days should be authorized and what proportion of those
5 should be private vs. community/non-profit), Scott's is glad to work with the BCDC to develop a
6 reasonable, workable and specific event formula with clarifications as to what constitutes "private" v.
7 "public" usage. Contrary to concerns raised by some Commissioners, Scott's is not seeking to be
8 "rewarded" with extra days for private events. Rather, Scott's would like to offer additional
9 community/non-profit events at the pavilion in addition to 73 private events. Such additional
10 community/non-profit events are consistent with the BCDC's enabling legislation since they enhance
11 public access and encourage visits to Jack London Square.

12 Currently, the permit says 73 days for private events, without defining what private actually
13 means. Exhibit A to permit, footnote 5, makes reference to coordinating "private events and any public
14 events", but is also utterly silent on the definition of what a "public event" actually is. (Hanson Dec. ¶
15 8, Exh. A.) The chart on Exhibit A to the permit says 292 days of "Public Use"-- that reasonably would
16 include any "Public Event". Scott's submits that one would reasonably consider an "event" to be
17 something more than simple "use", which naturally draws into question why Scott's understanding of
18 the express terms of the permit under which it has been operating is somehow erroneous. Scott's has
19 treated public, community-based, charitable, non-profit "events" as being "public events" (i.e. a
20 category of "public use") of the pavilion for which the public benefit has outweighed any profit by
21 Scott's.

22 Without the benefit of clear language in the permit, the BCDC's administrative civil penalty
23 chart categorizes all public, community-based, charitable, non-profit events held at the pavilion as
24 "private" and has now, after 16 years of both private and public events hosted by Scott's, not only
25 decided to count those events *against* Scott's permitted private 73 days, but has gone back more than a
26 decade in time to retroactively penalize Scott's for years of hosting charitable, public use events that
27 have provided a tremendous benefit to the community – one that Scott's alone has always stepped up to
28 provide. (Declaration of Sandré Swanson; Declaration of Michelle Lewis; Declaration of Sally

1 Parsons; Declaration of Gina Longmire.)¹

2 It is clear to the casual observer and will be abundantly clear to a reviewing court that the BCDC
3 has not monitored or cared about this issue for 16 years (i.e. from 1997 when the pavilion began
4 operating until 2013 when the BCDC first proceeded with an enforcement action). Consequently, the
5 BCDC has waived any ability to penalize Scott's for those 13 years. The BCDC's own Enforcement
6 Committee (no member of which actually attended the November 3, 2016 full Commission meeting)
7 understood these issues and crafted a settlement with Scott's that addresses the past and looks forward
8 to the future and added days for pavilion use, not as a "reward" for Scott's alleged transgressions, but as
9 a benefit to the public that Scott's is uniquely suited to provide. (Verna Dec. ¶ 8, Exh. R.)

10 Scott's is also prepared to work with the BCDC to correct the permit's vagueness and ambiguity
11 on the issue of public access during daytime vs. nighttime pavilion use (i.e. nighttime use presents
12 significantly less concern regarding sight lines and Plaza use by non-pavilion visitors to Jack London
13 Square).

14 e. **Ongoing BCDC Oversight** Scott's and the Port of Oakland have already
15 offered to work with the BCDC to manage pavilion use under the framework referenced above and
16 remain ready, willing and able to do so going forward. But Scott's proposal to resolve this has been
17 categorically rejected by the BCDC.

18 **F. Permit Approval From the City of Oakland**

19 In an effort to resolve this conflict with the BCDC, Scott's applied to the City of Oakland for a
20 permit that would grant City approval of Scott's improvements to the pavilion, and would allow Scott's
21 to remedy the BCDC's major concern by replacing the metal entry door frame and beams with a new,
22 non-framed, solution. (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14, Exh. A.) The City of

23 ¹ Sadly, the BCDC's punitive efforts against Scott's will necessarily result in the elimination of Scott's
24 community-based, charitable, non-profit, public events which the BCDC demands count against Scott's
25 73 private days even though the event earns no money for Scott's and provides a great benefit to the
26 public/Oakland community. For example, because the BCDC rejected the Enforcement Committee's
27 settlement, Scott's will be unable to utilize one of the 73 pavilion days to host the annual fund raiser for
28 Gov. Jerry Brown's Oakland Charter School (OMI) where Scott's has been a major contributor. (E.
Gallagher Dec. ¶ 38.) The same is true for all of the other charitable events which have relied on
Scott's philanthropy and the pavilion event space at Jack London Square to raise money so that they
may continue to provide valuable services to the community.

1 Oakland has already granted a building permit to Scott's covering replacement of the hazardous canvas
2 wall material with the sliding wall system suspended on commercial rollers now in place at the pavilion.
3 This system allows bay views to remain unobstructed when there are no events, and allow the pavilion
4 to be enclosed when there are events. The sliding panel wall system approved by the City of Oakland
5 has also reduced the transition time between enclosed space and open space from the several hours it
6 took to both install and then remove the canvas walls, to a matter of minutes to slide the panel wall
7 segments into place and back to storage. (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14, Exh. A.)
8 The BCDC's concerns regarding public access have been wonderfully addressed by this a one-of-a-kind
9 system, inspired by Scott's principal Ray Gallagher.

10 Furthermore, the City has approved the past construction of the storage room, stage wall, and
11 breezeway between Scott's and the pavilion. Lastly, Scott's applied for and received City approval to
12 remove the metal entry door frame currently within the pavilion's footprint, and to replace it with a
13 removable door incorporated into the approved sliding panel wall system. In fact, the City of Oakland
14 approved Scott's permit application in its entirety. (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14,
15 Exh. A.)

16 Now that the City of Oakland has given its blessing (and building permit approval) to the vastly
17 improved system noted above, Scott's and the Port of Oakland intend to promptly file an application
18 with the BCDC to cover the same items. (Hanson Dec. ¶ 30; E. Gallagher Dec. ¶ 15.) Scott's sincerely
19 hopes that this very positive development will be looked upon favorably by the BCDC and will
20 facilitate the remediation of one of the most important issues expressed by the Enforcement Committee
21 and the Commission.

22 **III. FACTS THAT SCOTT'S ADMITS**

23 Scott's admits paragraph II(A) only to the extent that Scott's constructed a metal-framed entry
24 doorway, storage area and stage, metal-framed wall, multiple moveable wall panels and ceiling tracks in
25 the pavilion and a roof extension, but denies that any such improvements were unauthorized or
26 represent a substantial change in use. 14 CCR § 10125(b); Cal. Govt. Code § 66632(a).

27 Scott's admits paragraph II(C) to the extent that Scott's, from time to time, placed tents and
28 stanchions, stored event-related equipment (including planters), and a promotional vehicle was

1 occasionally parked in the Franklin or Broadway Street Plazas.

2 Scott's admits paragraph II(D) to the extent that, from time to time, Scott's submitted private
3 event schedules late. However, Scott's was relieved of this violation when BCDC retroactively
4 accepted these private event schedules.

5 Scott's admits Section III to the extent that it describes where the pavilion is located.

6 Scott's admits Section IV.

7 Scott's admits paragraphs VII(C)(1-4) to the extent that the documents exchanged by the parties
8 speak for themselves.

9 Scott's admits paragraph VII(C)(5) to the extent that, for fire safety purposes and for compliance
10 with permit setup and removal times, Scott's proceeded with installation of a paneled wall.

11 Scott's admits paragraphs VII(C)(6-7) to the extent that the documents exchanged by the parties
12 speak for themselves.

13 Scott's admits paragraphs VII(C)(8) to the extent that Scott's continues to use the pavilion for
14 private and charitable events under its permit while engaged with BCDC staff on the health, safety and
15 public access improvements it had made.

16 Scott's admits paragraphs VII(C)(9-10) to the extent that Scott's engaged in direct discussions
17 with BCDC to improve public access and safety features at the pavilion.

18 Scott's admits paragraphs VII(C)(11-12).

19 Scott's admits paragraphs VII(C)(13-14) to the extent that these are recitations of the
20 chronology. Scott's admits BCDC engaged in enforcement proceedings, which have resulted in where
21 the parties are now procedurally.

22 Scott's admits paragraph VII(E) to the extent that Scott's put in health and safety and fire safety
23 improvements which it believes are not inconsistent with the permit.

24 Scott's admits paragraphs VII(F) to the extent that it alleges Scott's has not committed a
25 violation.

26 Scott's admits paragraphs VII(F)(2) to the extent that it describes what the permit states.

27 Scott's admits paragraph VII(G)(1) to the extent that Scott's, from time to time, placed tents and
28 stanchions, stored event-related equipment (including planters), and a promotional vehicle was

1 occasionally parked in the Franklin or Broadway Street Plazas.

2 Scott's admits paragraph VII(G)(3) to the extent that it relies on evidence from a representative
3 of Scott's.

4 Scott's admits paragraph VII(G)(3)(a) to the extent that, from time to time, a promotional
5 vehicle was occasionally parked in the Broadway Street Plaza.

6 Scott's admits paragraph VII(H) to the extent that, from time to time, Scott's submitted private
7 event schedules late. However, Scott's was relieved of this violation when BCDC retroactively
8 accepted these private event schedules.

9 **IV. FACTS THAT SCOTT'S DENIES**

10 Scott's generally denies Section II as it is vague, general, and overbroad, and prevents Scott's
11 from making specific admissions.

12 Scott's denies paragraph II(A) to the extent it characterizes the activity as illegal, unauthorized,
13 or unpermitted, or that activity represented a permit violation or a substantial change in use.

14 Scott's denies paragraph II(B) as it is overbroad and lacks specificity.

15 Scott's denies paragraph II(C) to the extent it characterizes the activity as unpermitted.

16 Scott's denies paragraph II(E), as Scott's is not the owner of the pavilion or the underlying land,
17 and was not obligated to perform the described task(s).

18 Scott's generally denies paragraph II(F) as it is overbroad and lacks specificity.

19 Scott's generally denies paragraph II(G) as it is overbroad and lacks specificity.

20 Scott's generally denies Sections III-VI to the extent it characterizes any of Scott's activity as
21 illegal or in violation of a permit.

22 Scott's denies paragraphs VII(E) to the extent that it characterizes Scott's actions as a
23 substantial change of use or necessitating amendment to a permit under 14 Cal. Code Reg. Section
24 10125(b). Scott's further denies that Scott's actions contained therein fall under California Government
25 Code Section 66632(a).

26 Scott's denies paragraph VII(F) as it is overbroad and lacks specificity due to the number of
27 years described. Scott's further denies to the extent that it is inconsistent with Exhibit C to the
28 declaration of Elizabeth Gallagher.

1 Scott's denies the calculation of time described in paragraph VII(F)(3).

2 Scott's denies paragraph VII(F)(4-15) to the extent that it is inconsistent with Exhibit C to the
3 declaration of Elizabeth Gallagher.

4 Scott's denies paragraph VII(G) because the actions contained therein do not constitute
5 substantial change in use or necessitating amendment to a permit under 14 Cal. Code Reg. Section
6 10125(b).

7 Scott's generally denies paragraph VII(G)(3) to the extent that it relies on third-party evidence.

8 Scott's denies paragraph VII(G)(3)(b) because Scott's cannot verify this authority and there are
9 no photos attached to the referenced report.

10 Scott's denies the calculation of time contained in paragraph VII(H).

11 Scott's denies paragraph VII(I), as Scott's is not the owner of the pavilion or the underlying
12 land, and was not obligated to perform the described task(s).

13 Scott's denies paragraph VII(J) as it is overbroad and lacks specificity.

14 Scott's denies paragraph VII(K) as it is overbroad and lacks specificity.

15 To the extent that Section VIII is a repetition of previously stated facts and legal analysis,
16 Scott's is not obligated to respond to Section VIII.

17 **V. OTHER FACTS THAT MAY EXONERATE OR MITIGATE/**
18 **FACTS THAT SCOTT'S HAS NO PERSONAL KNOWLEDGE OF**

19 Scott's has no personal knowledge of the contents of paragraph VII(C)(5) to the extent that it
20 discusses what and when BCDC staff obtained certain information.

21 **VI. ADDITIONAL FACTUAL AND LEGAL ARGUMENTS**

22 **A. THE MCATEER-PETRIS ACT**

23 The McAteer-Petris Act (the "Act") created the San Francisco Bay Conservation and
24 Development Commission ("BCDC") as a response to haphazard and uncoordinated filling of San
25 Francisco Bay. The primary purpose of the Act is to promote responsible planning and regulation of
26 San Francisco Bay. The Act emphasizes the elimination of the unnecessary placement of fill in the
27 Bay; the use of the Bay for water-oriented uses; and the inclusion of public access consistent with a
28 proposed project. BCDC's jurisdiction generally extends to all areas of the Bay that are subject to tidal

1 action, including sloughs and marshlands, to a 100-foot shoreline band surrounding the Bay, to salt
2 ponds and managed wetlands as defined in the Act, and certain designated waterways.

3 The Act requires that people obtain permits to fill, to extract materials, and to make substantial
4 changes in use of land, water or existing structures in the Bay. In determining whether to issue permits,
5 the BCDC looks to policies set forth in the Act and in the San Francisco Bay Plan.

6 California Government Code Section 66600, part of enabling legislation of the Act, states as
7 follows:

8 The Legislature hereby finds and declares that the public interest in the San Francisco
9 Bay is in its beneficial use for a variety of purposes; that the public has an interest in the
10 bay as the most valuable single natural resource of an entire region, a resource that gives
11 special character to the bay area; that the bay is a single body of water that can be used
12 for many purposes, from conservation to planned development; and that the bay operates
13 as a delicate physical mechanism in which changes that affect one part of the bay may
also affect all other parts. It is therefore declared to be in the public interest to create a
politically-responsible, democratic process by which the San Francisco Bay and its
shoreline can be analyzed, planned, and regulated as a unit.

14 As noted by the Court in *Mein v. San Francisco Bay Conservation Etc. Com* (1990) 218 Cal.App.3d
15 727, 732, the Act was intended to prevent further piecemeal filling of the bay. However, water-oriented
16 land uses along the bay shoreline, such as public assembly (e.g. at the pavilion), were deemed by the
17 Legislature to be essential to the public welfare of the bay area. At the time the Act was passed, the
18 Legislature believed that existing public access is inadequate and maximum feasible access should be
19 provided. In fact, Cal. Govt. Code § 66602 entitled “Findings and Declarations as to Necessity for
20 Providing Locations for Water-Oriented Land Uses and Increased Public Access to Shoreline and
21 Waters” states:

22 The Legislature further finds and declares that certain water-oriented land uses along the
23 bay shoreline are essential to the public welfare of the bay area, and that these uses
24 include ports, water-related industries, airports, wildlife refuges, water-oriented
25 recreation and public assembly, desalinization plants, upland dredged material disposal
26 sites, and power plants requiring large amounts of water for cooling purposes; that the
27 San Francisco Bay Plan should make provision for adequate and suitable locations for all
these uses, thereby minimizing the necessity for future bay fill to create new sites for
these uses; that existing public access to the shoreline and waters of the San Francisco
Bay is inadequate and that maximum feasible public access, consistent with a proposed
project, should be provided.

28 When the Act was passed, the Legislature believes strongly that private investment in shoreline

1 development should be vigorously encouraged. California Government Code Section 66605.1 states:

2 The Legislature finds that in order to make San Francisco Bay more accessible for the use
3 and enjoyment of people, the bay shoreline should be improved, developed and
4 preserved. The Legislature further recognizes that private investment in shoreline
5 development should be vigorously encouraged and may be one of the principal means of
6 achieving bay shoreline development, minimizing the resort to taxpayer funds; therefore,
7 the Legislature declares that the commission should encourage both public and private
8 development of the bay shoreline.

9 Scott's (which has borne all of the costs associated with the design, construction, repair and
10 maintenance of the pavilion and who has brought over 300,000 people to the waterfront to attend events
11 therein) is a perfect example of a citizen who has fulfilled, and continues to fulfill, the Legislatures'
12 goals expressed by the McAteer-Petris Act. Rather than bringing the full weight of the BCDC's
13 punitive hammer down on top of Scott's head for purely administrative permit violations -- rather than
14 against bay fillers to whom the BCDC has historically only given a slap on the wrist in terms of civil
15 penalties, See, Verna Dec. ¶ 2, Exh. A -- Scott's would like to work with the BCDC to resolve claims
16 against it and continue to play its role in enhancing public access by bringing visitors to the bay and
17 through its unquestioned community support and contributions.

18 **B. THE PROPOSED PENALTY IS OUT OF PROPORTION TO THE HARM**

19 California Government Code Section 66641.9(a) requires the following factors be considered
20 when determining the amount of administrative civil liability a party on the receiving end of a BCDC
21 enforcement action should receive:

22 In determining the amount of administrative civil liability, the commission shall take into
23 consideration the nature, circumstance, extent, and gravity of the violation or violations,
24 whether the violation is susceptible to removal or resolution, the cost to the state in
25 pursuing the enforcement action, and with respect to the violator, the ability to pay, the
26 effect on ability to continue in business, any voluntary removal or resolution efforts
27 undertaken, any prior history of violations, the degree of culpability, economic savings, if
28 any, resulting from the violation, and such other matters as justice may require.

In this case, the proposed penalty is vastly out of proportion to the actual harm.

1. The Nature, Circumstance, Extent, and Gravity of the Violation or Violations

Under the framework of the McAteer-Petris Act set forth above, the violations for which Scott's
is accused by the BCDC are quite modest and fall into categories relating to non-substantial
improvements to an existing structure with no change in how the structure is used, hosting too many

1 events (including public charitable events) and paperwork. The nature of Scott's violations are so
2 modest in fact that the BCDC took no action against Scott's for sixteen years until Scott's decided to
3 improve public access by designing, paying for and installing a safer and faster system to set up and
4 take down the pavilion's walls, changing from the original canvas material to a moveable sectional
5 panel design. (E. Gallagher Dec. ¶ 9.) Clearly then, not even the BCDC found the nature,
6 circumstance, extent and gravity of Scott's alleged transgressions under the permit sufficient to warrant
7 any enforcement action whatsoever until 2013, when objections were raised to a door frame. (Verna
8 Dec. ¶ 7, Exh. Q.)

9 The \$841,180 civil administrative penalty sought from Scott's is unprecedented. Never before
10 in the history of the BCDC has a non-environmental, non-wildlife and non-bay-related penalty
11 exceeded \$45,000. The following chart reflects the top 12 civil penalties the BCDC has assessed,
12 separated into categories:

13
14
15
16 Continued on following page.
17
18
19
20
21
22
23
24
25
26
27
28

Respondent	Date of Order or Settlement	Amount of Penalty	Bay	Environment	Impeding Public Access	Misuse	Building	Overuse	Paperwork
Scott's Jack London Seafood, Inc./Port of Oakland	Pending	\$841,180					X	X	X
Point Buckler Club, LLC/John D. Sweeney	November 17, 2016	\$952,000	X	X		X	X		X
Richard and Dolores Karnes	February 17, 1994	\$220,000	X	X					
Trux Airline Cargo Services/City of South San Francisco	August 4, 2016	\$210,000, but \$10,000 refunded when respondents comply		X	X		X		X
Todd J. Dworman/T.J. Enterprises, LLC/Waterpark Lofts, LLC	February 24, 2003	\$90,000, but only \$40,000 if respondents comply fully with terms of order		X	X		X		X
San Francisco International Airport	July 31, 2001	\$122,000	X						
Golden Gate Bridge, Highway, and Transportation District	August 21, 2008	\$50,000 unless District complies with entire settlement		X	X	X	X		X
City of Redwood City	June 7, 2001	\$45,000			X		X		X
Light and Sound 186, Ltd./Belvedere Beach, Inc./David Papera	June 7, 2001	\$40,000	X			X	X		X
J.E. McAmis, Inc.	November 19, 2003	\$37,500	X	X					
Thomas J. Moseley/K.M.C. Inc.	August 17, 2006	\$13,500, plus \$23,900 if respondents do not comply with order	X	X	X		X		
San Pedro Cove Homeowners Association, Inc.	August 5, 2010	\$35,000 if not resolved within 90 days					X		X

(Verna Dec. ¶ 2, Exh. A.)

As the Commission can see from the chart above, the penalty assessed against Scott's is drastically out of sync with violations that are administrative in nature with no bay or environmental components. For instance, in City of Redwood City (June 7, 2001) cited above, the BCDC issued a \$45,000 civil penalty for the City's failure to complete the plan review and approval process (\$5,000), submit and

1 record legal instruments reserving public access areas (\$20,000), and install the required public access
2 improvements (\$20,000). BCDC had given Redwood City a permit to raise, upgrade, use and maintain
3 a flood control levee as part of a new residential development, however Redwood City violated the
4 permit by failing to submit and obtain approval for public access plans; failing to submit legal
5 instruments to reserve the alternative inland public access areas within the City's control; failure to
6 construct the public access improvements within the alternative inland public access areas before
7 certain deadlines; and failure to construct exterior public access levee improvements. These violations
8 involved a multi-year time period and were settled on the recommendation of the enforcement
9 committee and the full commission for \$45,000. (Verna Dec. ¶ 2, Exh. D.)

10 The claims against Scott's essentially involve its installation of two 8x8 stanchions as a method
11 of securing the sliding wall sections to which the BCDC objects, and its overuse of the pavilion. The
12 other items are fire safety (roof extension over the sprinkler system piped from Scott's restaurant),
13 storage (of items for public use within the pavilion), tables and chairs (style and placement), or purely
14 administrative items having to do with event schedules and related paperwork. While Scott's does not
15 discount the BCDC's authority to enforce its permit, it respectfully notes that the BCDC had no
16 problem with Scott's use and management of the pavilion until the metal door frame was installed in
17 2013. Scott's seeks consistent application of non-environmental, administrative penalties where the
18 nature, circumstance, extent, and gravity of the violation or violations is properly considered as a
19 statutory factor in determining the amount of penalties to be assessed, particularly, as here, where there
20 has been no substantial change in the use of the pavilion.

21 With regard to the metal door frame, Scott's understands that sightline objections were noted.
22 Scott's submits that while the two 8x8 inch stanchions could slightly obstruct one's view depending on
23 where he or she is standing in Franklin Plaza, they are far less obstructive to sightlines than are the
24 dozens of kayaks and canoes which regularly spill into the plaza from a neighboring business. (Hanson
25 Dec. ¶ 34, Exhs. G-H.) Scott's believes the following two photographs illustrate this point clearly:

26 //

27 //

28 //



(Hanson Dec. ¶ 34, Exhs. G-H.)

Regardless, Scott's has just been granted a permit from the City of Oakland's building department for their removal. Further, the City of Oakland has now given its stamp of approval to all of

1 the other improvements Scott's has made to the pavilion including storage structure, stage wall, and fire
2 sprinkler protecting breezeway between the pavilion and restaurant.

3 With regard to BCDC's calculation of over-use of the pavilion, Scott's submits that the permit is
4 vague and ambiguous. As discussed in detail above in section II.E.2.d, over-use depends on how one
5 defines "private use" (which the BCDC never actually defined in the permit).

6 Issues relating to storage, furniture, signage, a vehicle, and similar non-bay-fill related violations
7 set forth in the Violation Report/Complaint, round out Scott's alleged violations. In her declaration,
8 Scott's president, Elizabeth Gallagher, sets forth Scott's efforts to meet all of the permit's more
9 technical requirements and how it has repeatedly been thwarted in some of its efforts by members of the
10 public who are less appreciative of the bay resource and public access improvements than one would
11 hope to encounter.²

12 Not only is it unfair and inequitable to reach back more than 13 years to calculate a civil penalty
13 over violations that the BCDC never sought to enforce, but such technical violations had zero impact on
14 the bay and yet the BCDC seeks a penalty almost 19 times higher than the next closest non-
15 environmental penalty ever assessed. Scott's alleged violations also don't merit a penalty dozens of
16 times higher than penalties imposed for far less technical and far more harmful environmental
17 violations by bay fillers.

18 **2. Whether the Violation is Susceptible to Removal or Resolution**

19 Each type of violation cited against Scott's is susceptible to removal or resolution. All of the
20 health and safety improvements that Scott's made were covered within the scope of Scott's current
21 permit. None of them have any effect outside of the existing footprint of the pavilion, and do not
22 constitute a substantial change of use. (E. Gallagher Dec. ¶ 13.) The improvements have enhanced
23 Scott's guests' experience, safety, and public access. For example, the roof extension protects utilities
24 and guests and the wall system increases public safety and decreases set up and take down time. The
25 wall system is also made of non-flammable metal rather than the canvas tent material of the old system.
26 Scott's understood the items in dispute to be permissible under its permit because they did not represent

27 _____
28 ² Vandals repeatedly destroyed the signage Scott's installed under the permit and criminals stole the
binoculars provided for public enjoyment (and the signage from time to time).

1 a substantial change in use of the pavilion—and if no “substantial change in use” has occurred, no
2 amended permit is required under the law.

3 That noted, Scott’s has obtained a permit from the City of Oakland to remove the metal
4 doorframe to which the BCDC has strongly objected and to allow installation of a new door into the
5 system of sliding wall panels. (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14, Exh. A.) The City’s
6 permit also granted formal approval of the retractable wall system, as well as Scott’s storage building,
7 stage wall, and breezeway between the pavilion and restaurant. (Hanson Dec. ¶ 29, Exh. F; E.
8 Gallagher Dec. ¶ 14, Exh. A.) Scott’s and the Port of Oakland will file a request for a permit
9 amendment with the BCDC for these items. So this issue is not only susceptible to resolution, but it
10 will soon be up to the BCDC to authorize the resolution.

11 Scott’s has not parked a promotional car in the plaza for the past two years and will not do so in
12 the future. Scott’s seeks clarification and a new agreement with the BCDC through an amended permit
13 expressly defining public use of the pavilion and not penalizing Scott’s for charitable public use of the
14 pavilion where no profit is made. The BCDC dramatically overstates Scott’s action with regard to
15 Scott’s alleged unauthorized private use. (E. Gallagher Dec. ¶ 22.)

16 With regard to Scott’s submittal of private event schedules, remedying untimely submittals is
17 purely administrative and will be achieved through greater diligence. Interesting that the BCDC never
18 asked for private event schedules for years yet now seeks to penalize Scott’s for not providing them.

19 With regard to Scott’s alleged failure to permanently dedicate the pavilion public access area,
20 the City of Oakland (Port) is the only party capable of dedication of these areas and has agreed to do so.
21 (Hanson Dec. ¶ 35; E. Gallagher Dec. ¶ 18.)

22 With regard to Scott’s alleged failure to install the required public access improvements in the
23 pavilion, Scott’s installed all of the signage, binoculars, and the other requirements under the permit,
24 but as the BCDC is already aware, the signs and binoculars were often stolen and otherwise vandalized,
25 presumably by members of the public, and Scott’s replaced the signs every time they were alerted that
26 they had been stolen. (E. Gallagher Dec. ¶ 19.) Scott’s binoculars were similarly stolen or vandalized
27 and destroyed. Until this enforcement proceeding commenced, no one from the BCDC ever alerted
28 Scott’s that it was required to continue throwing money away on items that were regularly stolen or

1 vandalized over the period of time Scott's maintained them. Scott's will remedy all issues relating to
2 these items but seeks the BCDC's guidance in this regard.

3 Scott's will also work with the BCDC on any table and chair issues when the pavilion is open
4 for general public use. Scott's understood the existing tables and chairs to have been approved. (E.
5 Gallagher Dec. ¶ 20, Exh. B.) If they are not, Scott's will purchase approved tables and chairs. With
6 regard to non-compliant use of the pavilion, for the past 6 years, Scott's has not hosted more than 73
7 private events at the pavilion consistent with its permit. Scott's has considered public/community
8 charitable non-profit events in excess of 73 total usage days to be still compliant with the permit
9 requirement of "Public Use Days." When a local charitable organization or non-profit has come to
10 Scott's and asked for help staging an event in the pavilion for fundraising, or to help raise community
11 awareness of their cause, Scott's was happy to do so because it saw these events as for the public good.

12 Issues and confusion regarding the definition of public use days can be remedied through
13 amendment to the permit with additional definitions and clarification. Scott's would like to continue
14 hosting such events, but not at the expense of its permitted days. Scott's believes that there is a remedy
15 to this issue that everyone will be satisfied with and seeks BCDC's guidance in formulating a
16 reasonable and workable solution. The same can be said for consecutive day, or weekend concerns and
17 a better understanding of public plaza usage so as to achieve the optimum balance of all competing
18 interests. The bottom line here is that all items are susceptible to removal or resolution.

19 **3. The Cost to the State in Pursuing the Enforcement Action**

20 Here, any costs are due to BCDC's conduct. Scott's agreed to the Enforcement Committee's
21 recommended Stipulated Cease and Desist and Civil Penalty Order, but it was rejected by the full
22 Committee. Consequently, any costs in issuing a Violation Order, court enforcement, or the litigation
23 that may ensue, will be caused by the BCDC's decision not to agree with what their own staff and
24 Enforcement Committee recommended, and BCDC's refusal to agree to (or even negotiate) a revised
25 settlement proposal made by Scott's after the Commission's rejection on November 3, 2016.

26 **4. With Respect to the Violator, the Ability to Pay**

27 The \$841,180 penalty is more than double what Scott's Jack London Seafood restaurant earns as
28 profit in an entire year and will cripple Scott's business. (E. Gallagher Declaration ¶¶ 35-36; Exhibit

1 C.) The administrative civil penalty threatens Scott's ability to stay in business at Jack London Square
2 and the livelihoods of everyone who depends on Scott's, not to mention Scott's ability to continue
3 helping the community through Scott's charitable contributions. (E. Gallagher Declaration ¶¶ 37-39.)
4 Scott's Jack London Seafood has currently has roughly \$5,000 cash on hand. (E. Gallagher Declaration
5 ¶ 42.)

6 Scott's overall profit margin is approximately 4.65% and competition in the restaurant industry
7 is fierce, especially in attracting customers to Jack London Square when other parts of Oakland are
8 enjoying a resurgence in new dining and entertainment establishments. (E. Gallagher Declaration ¶ 33.)
9 At the very least, such a large penalty would force Scott's to lay off cooks, servers, bartenders, and
10 more, which would devastate its workforce. (E. Gallagher Declaration ¶ 39.) A civil penalty
11 amounting to **more than two years total profit for this restaurant** (more than two times the average
12 yearly profit Scott's Jack London Seafood restaurant has made for the last nine years) could be a blow
13 from which Scott's could not recover. (E. Gallagher Declaration ¶ 41.) Scott's would face a
14 tremendous competitive disadvantage if it were forced to pay more than triple the fine it had agreed to
15 pay under the Enforcement Committee's stipulated settlement.

16 Two restaurants have closed in Jack London Square this year alone. (E. Gallagher Declaration ¶
17 42.) Scott's would have to discontinue maintenance, water, HVAC, electricity and other services it
18 alone provides to the pavilion. Scott's may be forced to sell the unique panel wall system it purchased
19 and its bathroom facilities would thereafter be restricted to Scott's customers only. (E. Gallagher
20 Declaration ¶ 43.) Bottom line, the pavilion would go unused—and not draw anyone to the waterfront.

21 The pavilion is not Scott's private cash cow and Scott's has not made much money from its use
22 over the years. (E. Gallagher Declaration ¶¶ 33, 36, Exhs. C, E-F.) If the quality of the Scott's dining
23 experience decreases, Scott's will lose customers, and its revenue and profit will fall even more. This
24 circumstance has been called a "death spiral," which is virtually impossible to pull out of. Scott's will
25 also have to decline every request for charitable use of any of its restaurant facilities and decrease its
26 charitable giving as it would struggle to recover literally years of restaurant profits paid as a penalty for
27 non-bay-fill administrative violations. (E. Gallagher Declaration ¶ 37.)

28 //

1 **5. The Effect on Ability to Continue in Business**

2 See above. Payment of a civil administrative penalty of more than two years total restaurant
3 profits could well force Scott's Jack London Seafood out of business, with a corresponding loss to its
4 employees, customers, vendors, and the community organizations Scott's annually supports.

5 **6. Any Voluntary Removal or Resolution Efforts Undertaken**

6 Please see section VI.B.2 above. Once Scott's was alerted that the BCDC was investigating the
7 improvements Scott's had made at the pavilion, Scotts consultant Steven Hanson started working on
8 behalf of Scott's to engage with the BCDC to ensure the improvements it had made would be
9 acceptable. For example, in late February 2013, Hanson had several discussions with Ellen
10 Miramontes, the BCDC's Bay Design Analyst, about Scott's movable wall system and to keep them
11 apprised of our construction schedule. (Hanson Declaration ¶ 23, Exh. C.)

12 On April 16, 2013, Hanson and Miramontes continued their work together to address the
13 BCDC's issues in advance of approval of an amended permit. Hanson submitted to Ms. Miramontes a
14 timeline showing our efforts to work with the BCDC in their formal approval process, and explained
15 that Scott's was willing to make adjustments to the wall system to accommodate the BCDC's wishes
16 and ensure that the walls are compliant with the originally approved drawings. (Hanson Declaration ¶
17 24, Exh. D.)

18 On June 3, 2013, Hanson sent an email to Adrienne Klein of the BCDC to follow up on a
19 meeting we had the previous week, in which we discussed the violations that the BCDC is alleging
20 Scott's committed. The purpose of his email was to ensure Scott's understood the specific allegations
21 that BCDC was making and how Scott's could operate in compliance with the BCDC. Steve Fagalde
22 and Hanson continued to correspond with the BCDC on behalf of Scott's. (Hanson Declaration ¶ 25,
23 Ex. E.)

24 In a further effort to address the BCDC's concerns, as noted above, Scott's has now obtained a
25 permit from the City of Oakland to remove this metal frame and install a new door into the retractable
26 walls. (Hanson Dec. ¶ 29, Exh. F; E. Gallagher Dec. ¶ 14, Exh. A.) The City's permit also approves
27 the sliding track and the retractable wall system, the breezeway between the restaurant and the pavilion
28 that protects pavilion guests and utility pipes from weather, and approves Scott's storage room and

1 stage wall. Scott's and the Port of Oakland will apply to the BCDC for an amended permit that would
2 allow the same changes that the City of Oakland just approved. (Hanson Dec. ¶ 30; E. Gallagher Dec. ¶
3 15.)

4 Additionally, Scott's voluntarily tried to resolve these issues with the BCDC twice already.
5 First, in the Fall of 2016 when it agreed to a Stipulated Cease and Desist Order with the BCDC
6 (supported by staff and the Enforcement Committee) and again in early December 2016 when Scott's
7 made an enhanced proposal through its legal counsel Michael Verna to the BCDC's legal counsel Marc
8 Zeppetello for resolution after the full Commission rejected the Stipulation. (Verna Dec. ¶ 3.) Despite
9 submission of Scott's enhanced settlement proposal, Mr. Verna was informed that no further
10 negotiations would take place. Shortly thereafter, Scott's received the BCDC's Violation Report and
11 Complaint assessing a civil administrative penalty of \$841,180.00.

12 Scott's obviously cannot agree to a civil penalty of \$841,180, or anything close to that, so what
13 more could Scott's have possibly done to undertake voluntary action to resolve this case? BCDC staff
14 refused to negotiate or even discuss a resolution with Scott's—it just unilaterally issued a Violation
15 Order and Complaint. There can be no question that through Mr. Hanson's lengthy and detailed efforts
16 including the submission of plans and mitigation designs; Mr. Fagalde's efforts; Scott's previous legal
17 counsel's efforts, Scott's work with the Enforcement Committee in reaching a stipulated settlement that
18 the Enforcement Committee recommended be adopted by the full commission in light of its significant
19 public benefit, and finally Scott's enhanced proposal through Mr. Verna, that Scott's has already taken
20 demonstrative voluntary action to address each and every concern the BCDC has raised. If the BCDC
21 will be Scott's partner in seeking a resolution, Scott's is confident a mutually acceptable resolution can
22 be achieved. As it stands with Scott's facing such an unparalleled and crippling non-environmentally
23 based civil penalty, Scott's has no choice but to put up a vigorous legal fight and advance this matter to
24 the Superior Court.

25 **7. Prior History of Violations**

26 Prior to this enforcement action, the BCDC had not instituted any prior enforcement
27 proceedings and had never alerted Scott's to any violations. The BCDC has accepted retroactively
28 paperwork that Scott's acknowledges it was late in providing.

1 **8. The Degree of Culpability**

2 Scott's agreed to the terms of a settlement worked out with the Enforcement Committee that
3 included an administrative civil penalty of \$250,000. No evidence has been offered to qualify any
4 actual harm to the bay or to the public as a result of Scott's violations, which not even the BCDC
5 mentioned for **the first 16 years of pavilion use**. Scott's has addressed above many of the public
6 access concerns and also notes how limited public use of the plaza is during evening events held at the
7 pavilion. No persons are denied access to the water's edge and no sight lines are obstructed in the dark.

8 The violations of which the BCDC complains are technical in nature and Scott's acknowledges
9 its role, discussed at great length herein. However, just as driving 66 mph in a 65 mph zone is a
10 technical violation of the law, so has been Scott's technical violations of its permit. Relatively minor in
11 the larger scope of things (including the McAteer-Petris Act's primary concerns), and fortunately
12 capable of immediate correction going forward. And its violations have had no impact whatsoever on
13 the bay.

14 **9. Economic Savings, if any, Resulting From the Violation**

15 There have been no savings at all. As set forth in the profit and loss spreadsheet attached to
16 Elizabeth Gallagher's declaration as Exhibit C, for the past nine years (from 2008 through 2016) Scott's
17 has made a grand total of \$2,968.12 from use of the pavilion for private events in excess of 73 days in a
18 calendar year. (E. Gallagher Declaration ¶ 36.) At the same time, Scott's has paid the entire costs of
19 construction of pavilion, its improvements, maintenance, utilities, taxes, etc. If Scott's fails, so will the
20 pavilion and its usefulness to Jack London Square as stimulator for repeat visits by an unfamiliar public.
21 In a climate of frequent restaurant failures (including within the Jack London Square Development) (E.
22 Gallagher Declaration ¶ 42), Scott's has been an anchor and cannot be easily replaced. (Hanson
23 Declaration ¶ 4.) More importantly, Scott's value to the community as a long-standing benefactor is
24 irreplaceable. (Hanson Declaration ¶ 37.) Scott's positive impact on the health of Jack London Square
25 economically should not be underestimated, nor should Scott's use of the pavilion be underestimated in
26 terms of its impact on public awareness of, and access to, the waterfront -- the mission statement of
27 BCDC and why BCDC gave Scott's the permit in the first place for the pavilion. (Hanson Declaration ¶
28 7.) Forcing Scott's to abandon the pavilion because it can't afford to continue to lose money operating it

-- especially if it is hit with a big penalty -- runs contrary to BCDC's mission statement, and will allow Franklin Plaza to revert to the parking lot and garbage area it was before the pavilion was built.

10. Such Other Matters as Justice May Require

Simply put, justice requires fairness, impartiality, a lack of vindictiveness, the avoidance of punitive measures where unwarranted, a big picture view of the overall situation, an understanding of the law of unintended consequences, and the ability to compromise. Scott's wants to be a good neighbor—it certainly does not want to be put out of business for administrative, minor violations that are both easily remedied and haven't damaged the bay one iota. Justice does not require an \$841,180 civil administrative penalty in this case.

C. THE BCDC HAD KNOWLEDGE OF SCOTT'S TECHNICAL PERMIT VIOLATIONS FOR 16 YEARS AND TOOK NO ACTION. THE BCDC IS THEREFORE ESTOPPED FROM IMPOSING CIVIL ADMINISTRATIVE PENALTIES AGAINST SCOTT'S PRIOR TO THE COMMENCEMENT OF THE ENFORCEMENT ACTION IN 2013

In its October 21, 2015 report to the Commission, the Enforcement Committee wrote:

It should be noted that only after Scott's commenced construction of the new wall panel structure without authorization did BCDC activate an enforcement action, despite staff's earlier knowledge that the existing permit requirements were likely being violated. This delay in enforcement over the lengthy period of noncompliance prior to May 2013 could give the Permittees equitable arguments for substantially reducing the amount of penalties imposed in a contested proceeding. (Verna Dec. ¶ 7, Exh. Q) (Emphasis added.)

For reasons that will become apparent through an adversarial action in Alameda County Superior Court, the BCDC seeks to impose a penalty on Scott's for technical permit violations that is greater than all but one penalty (which directly impacted the bay) in the 50+ year history of the BCDC. (Verna Declaration ¶ 2, Exh. A.) The next closest penalty for non-environmental violations amounted to \$45,000 (City of Redwood City).

Obviously, something is wrong here. BCDC staff accumulated as many little violations as possible (without any notice to Scott's for over a decade) only to now seek to trump up a truly unprecedented amount of fines simply to get a massive total number intended to cripple Scott's. The punitive nature of this penalty is palpable and, in light of the nature of the violations and the BCDC's enforcement history, is nothing short of arbitrary and capricious.

1 **1. The BCDC Has Waived Its Right to Seek Civil Administrative Penalties**
2 **From Scott's Prior to Commencement of the Enforcement Action in 2013**

3 Under California law, "Waiver is the intentional relinquishment of a known right after
4 knowledge of the facts." *Roesch v. De Mota* (1944) 24 Cal.2d 563, 572. "[Waiver] may be implied
5 through conduct manifesting an intention to waive. Acceptance of benefits under a lease is conduct that
6 supports a finding of waiver." *Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179.
7 "Waiver . . . is a question of fact and not of law, hence the intention to commit a waiver must be clearly
8 expressed." *Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857.

9 In this case, the undisputed facts show that "despite staff's earlier knowledge that the existing
10 permit requirements were likely being violated", the BCDC did nothing for 16 years. (Verna Dec. ¶ 7,
11 Exh. Q. During that time, Scott's fulfilled the BCDC's goals by bringing hundreds of thousands of
12 people (members of the public) to Jack London Square to enjoy the waterfront and bay. Because staff
13 admits knowledge, the BCDC's waiver need not even be implied. Its conduct through inaction is
14 sufficient. All penalties for supposed violations prior to 2013 are equitably barred under California law.

15 **2. The BCDC is Barred From Assessing Civil Administrative Penalties Against**
16 **Scott's Prior to 2013 Under the Doctrine of Laches**

17 "The defense of laches requires unreasonable delay plus either acquiescence in the act about
18 which plaintiff complains or prejudice to the defendant resulting from the delay." *Johnson v. City of*
19 *Loma Linda* (2000) 24 Cal.4th 61, 68. Any delay is measured from the time the plaintiff knew (or
20 should have known) about the alleged claim. *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007)
21 153 Cal.App.4th 1144, 1157. The prejudice may be factual in nature or compromise the presentation of
22 a defense. *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th
23 593, 605; *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 406.

24 All of the elements of a classic laches claim are present in this case. The BCDC admits that
25 despite staff's knowledge that the existing permit requirements were violated prior to May 2013, "over
26 a lengthy period of time" the BCDC delayed enforcement. Then, just when Scott's decided to improve
27 public safety and access with its sliding wall panel system in 2013 did the BCDC get interested. Fast
28 forward to December 2016 and the BCDC issues a violation report and complaint imposing penalties

1 dating back at least **13 years**. BCDC had knowledge dating back to the construction of the pavilion in
2 1997 and did nothing. The BCDC's delay bars it from enforcement under the doctrine of laches.

3 **3. The BCDC is Barred From Assessing Civil Administrative Penalties Against**
4 **Scott's Prior to 2013 Under the Doctrine of Unclean Hands**

5 The defense of unclean hands arises from the maxim, "He who comes into Equity must come
6 with clean hands." *Blain v. Doctor's Co.* (1990) 222 Cal. App. 3d 1048, 1059. The doctrine demands
7 that a claimant act fairly in the matter for which he or she seeks a remedy. The Claimant must come
8 into court with clean hands, and keep them clean, or he/she will be denied relief, regardless of the
9 merits of the claim. *Precision Co. v. Automotive Co.* (1945) 324 U.S. 806, 814-815; *Hall v. Wright* (9th
10 Cir. 1957) 240 F.2d 787, 794-795. The defense is available in legal as well as equitable actions.
11 *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal. App. 2d 675, 728;
12 *Burton v. Sosinsky* (1988) 203 Cal. App. 3d 562, 574. Whether the doctrine of unclean hands applies is
13 a question of fact. *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal. App. 4th 631, 639. Lastly,
14 there must be a direct relationship between the misconduct and the claimed injuries so that it would be
15 inequitable to grant the requested relief. *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal. App.
16 4th 820, 846.

17 Here, the BCDC admits that it knew of Scott's technical permit violations, but took no action
18 before 2013. Those facts are not in dispute. There is also a direct relationship between the BCDC's
19 delay and its claimed injuries (by calculating civil penalties going back years but never complaining of
20 any violations during those years). The BCDC delayed enforcement year after year when, based on its
21 admitted knowledge, it could have asked Scott's for changes, and now it seeks to reach back during its
22 own period of inaction to achieve a massive penalty against Scott's that it also admits could have been
23 avoided. The terms arbitrary and capricious were created for situations such as this, as was the doctrine
24 of unclean hands.

25 **D. AT NO TIME HAS SCOTT'S EVER SUBSTANTIALLY CHANGED THE USE**
26 **OF THE PAVILION; ANY IMPROVEMENTS TO DATE DID NOT REQUIRE**
AN AMENDMENT TO ITS PERMIT

27 BCDC's complaint against Scott's improvements to the pavilion, and other supposed violations,
28 is based on its authority under Government Code § 66632(a), which requires a permit from BCDC "to

1 place fill, to extract materials, or *to make any substantial change* in use of any water, land or structure”.
2 In particular, the complaint alleges that this section was violated by (1) the roof extension, (2) a storage
3 area and stage, (3) a metal-framed entry doorway, a framed wall, and moveable wall panels, (4)
4 unauthorized use of the Broadway Street Plaza by displaying a promotional vehicle, and (5)
5 unauthorized use of the plaza by installing event tents, stanchions, and planters and storing equipment.
6 (Complaint at 7, ¶ VII.E.1, VII.G.1.)

7 BCDC defines a “substantial change in use” in 14 Cal. Code Reg. § 10125(b), which requires
8 any construction, reconstruction, alteration, or other activity, whether or not involving a structure, as
9 one that:

- 10 ○ Has an estimated cost of \$250,000 or more;
- 11 ○ Involves a change in the general category of use of a structure or of land (i.e.,
12 agriculture, residential, commercial, office, industrial, recreational, or vacant nonuse);
- 13 ○ Involves a substantial change in the intensity of use;
- 14 ○ Adversely affects existing or future public access;
- 15 ○ Is a subdivision of land under the Subdivision Map Act or other division of land,
16 including a lot split, if the subdivision or other division will (1) substantially affect either
17 present or future public access to or along the shoreline, or (2) substantially affect either
18 the present or future suitability of a water-oriented “priority use site” for that priority
19 use;
- 20 ○ Is an abandonment of any salt pond or managed wetland or any draining of water, except
21 temporary, short-term draining done as part of routine operations; or
- 22 ○ Is a change of a marina berth from recreational use to live-aboard use.

23 BCDC staff do not suggest that any of these factors apply to Scott’s violations, nor does BCDC
24 offer any evidence that any of these factors were violated by Scott’s. Indeed, BCDC staff only cites in
25 items (1), (2), (3) and (5) of pavilion improvements referenced above in support of its rationale that
26 there has been a “substantial change in use”. But this makes no sense. The pavilion was being used for
27 events and banquets before any structural improvements were installed, and has continued to be used
28 for those same purposes in the exact same way. No use has changed at all, much less any “substantial”

1 change in use, that would even require a BCDC permit.

2 The BCDC has not produced a scintilla of evidence that the minor roof extension, which
3 protects utilities and guests from exposure, has changed the use of the pavilion in any way (making it
4 better for the exact same types of events it has always hosted is not a substantial change in use.) Nor
5 does the minor roof extension change the public's use of the pavilion when no events are taking place
6 and the walls are down.

7 Similarly, the storage area and stage do not substantially change the pavilion's use as an event
8 and public gathering space.³ Rather, they enhance pre-existing usage by all parties, particularly in the
9 case of the walls which drastically reduce setup and take down time and improve public access.

10 With regard to the metal framed doorway, not only has Scott's received Oakland building
11 department approval to remove it (something BCDC has requested), but it too did not substantially
12 change the use of the pavilion. Rather, it simply provided an anchor to lock an earlier version of the
13 moveable wall panel system. Once removed, new panels will contain the doors.

14 Scott's has occasionally been forced, due to customer demands and event circumstances that it
15 did not directly control, to install an overflow tent. That has occurred on only a single handful of
16 occasions in the last 16 years. (E. Gallagher Declaration ¶ 16.) Even then, there has been no substantial
17 change in use of the pavilion since the tent allowed for overflow seating for the pavilion, and was
18 promptly removed. Even when erected, no public access to the bay was blocked at any time and there
19 is no evidence that any person seeking bay access was denied such due to a temporary tent in a small
20 portion of the plaza connected to the pavilion. Consequently, no change to Scott's permit has ever been
21 required and its actions have been warranted under existing authority.

22 **1. The Rule of Lenity**

23 Additionally, the rule of lenity should be applied to interpretations of the McAteer-Petris Act
24 here. The U.S. Supreme Court has established that any "ambiguity concerning the ambit of criminal

25 ³ For reasons unknown to Scott's, the BCDC has lost the ability to see the forest for the trees in this
26 case. In other words, it has become so involved in the details of the claim against Scott's that it is not
27 looking at the situation as a whole. The pavilion exists for public and private events and to encourage
28 use of the space, visits to Jack London Square and enjoyment of the bay resource. An improved wall
system, a minor roof extension that serves an express purpose, unobtrusive storage and the occasional
use of a tent by Scott's to accommodate last minute guests do not represent substantial changes in use
one iota and absolutely encourage temporary use and enjoyment of guests and the public.

1 statutes should be resolved in favor of lenity”. *United States v. Bass* (1971) 404 U.S. 336, 347, citations
2 omitted. The rule of lenity applies to actions for civil penalties. *See Leocal v. Ashcroft*, 543 U.S. 1, 11
3 n.8 (2004) (for statute with both civil and criminal penalties, “whether we encounter its application in a
4 criminal or noncriminal context, the rule of lenity applies”).

5 Although the complaint does not specify which of the three grounds in § 66632(a) has allegedly
6 been violated, it should be safe to say that none of these activities would qualify as an extraction of
7 materials. That leaves two remaining grounds: placement of fill and substantial change in use.

8 The first alleged violation, the construction of a roof extension, is neither placement of fill nor a
9 substantial change in use. As noted above, the McAteer-Petris Act requires a permit “to place fill”.
10 Gov. Code § 66632(a). It is clear that the Legislature used the word “fill” in the traditional sense of dirt
11 placed in waters. *E.g.* Gov. Code § 66601 (finding that “piecemeal filling of the bay may place serious
12 restrictions on navigation in the bay, may destroy the irreplaceable feeding and breeding grounds of fish
13 and wildlife in the bay, may adversely affect the quality of bay waters and even the quality of air in the
14 bay area”); *see e.g.* Clean Water Act § 404 (permits for discharge of dredged or fill material). Because
15 it is wholly unrelated to the placement of material on the ground, a roof extension cannot reasonably be
16 considered “fill”.

17 To be sure, section 66632(a) specifies that “‘fill’ means earth or any other substance or material,
18 including pilings or structures placed on pilings, and structures floating at some or all times and moored
19 for extended periods, such as houseboats and floating docks”. The prosecution team may argue that a
20 roof extension is a “substance or material”. But that phrase must be interpreted in context, and the
21 Legislature plainly meant that to include any substance or material *used as fill*, but not substances or
22 materials used for other purposes. The “including” clause tells us that Legislature considered pilings,
23 docks, and houseboats to be the equivalent of dirt placed in the bay. It also tells us that the Legislature
24 *did not* intend to include minor modifications to permitted structures, or placement of substances in
25 developed areas—there is nothing in the definition to suggest that “fill” is intended to cover these acts.

26 Interpreting the statute to apply to any placement of any substance leads to absurd results. The
27 placement of plates of food before diners, for example, is a placement of a substance. People walking
28 along the water in Jack London Square engage in the placement of a substance—their shoes—within

1 BCDC jurisdiction. People driving along the shoreline, or parking near it, are placing tires on the
2 ground. The prosecution team cannot seriously suggest that these activities require permits.

3 The roof extension is not a *substantial* change of use because BCDC staff has submitted no
4 evidence that any use has changed at all, much less substantially, as a result of the roof extension.
5 Plainly, the roof extension is to protect the pre-existing uses of the pavilion, which are authorized by the
6 permit. Guests who walk from the main building to the pavilion during rainy weather should not be
7 subjected to the surprise and unpleasantness of a splash of cold water in the face.

8 The second and third alleged violations—a storage area, stage, metal-framed entry doorway,
9 framed wall, and moveable wall panels—are for the same reasons neither fill nor a substantial change in
10 use. They are minor modifications to a previously permitted structure. Some of the alleged changes are
11 quite minor. For example, the permit refers to “fabric panels enclosing the private events”, while the
12 Complaint alleges that these panels were made of metal. (Permit at 4; Complaint at 7.) As explained
13 above, nothing about the McAteer-Petris Act suggests that modifying movable panels—panels that are
14 specifically allowed by a BCDC permit—is a placement of “fill” in San Francisco Bay. Nor can a
15 change in the panel material be considered a substantial change in use, because the modified panels
16 were used in the same way as the original panels.

17 The fourth and fifth acts (allegedly unauthorized use of the Broadway Street Plaza by displaying
18 a promotional vehicle, and allegedly unauthorized use of the plaza by installing event tents, stanchions,
19 and planters and storing equipment) are for the same reasons neither fill nor a substantial change in use.
20 BCDC staff does not appear to be suggesting that the temporary parking of a vehicle or planter is “fill”;
21 it seems, rather, to be suggesting that these are substantial changes in use. But there is no evidence of
22 substantiality.

23 The assertion that a permit is needed for these activities is directly contradicted by the permit,
24 which specifies that only written approval is needed:

25 If the permittees wish to use the public access area for other than those
26 purposes expressly delineated in paragraph II-B-2, the permittees must
obtain prior written approval by or on behalf of the Commission.

27 (Hanson Declaration ¶ 8, Exh. A.)

28 The proper conclusion, therefore, is these acts are not in violation of the McAteer-Petris Act,

1 because no permit was needed to engage in them.

2 **2. The Alleged Violations Have Been Overcounted**

3 BCDC staff is proposing penalties under Section 66641.5(e) of the McAteer-Petris Act.
4 (Complaint at 39.) That section limits administrative penalties to \$30,000 per violation:

5 Civil liability may be administratively imposed...in an amount...[not] more than
6 two thousand dollars (\$2,000), for each day in which that violation occurs or
7 persists, but the commission may not administratively impose a fine of more than
8 thirty thousand dollars (\$30,000) for a single violation.

9 As the statute makes clear, this \$30,000 limit applies to a violation no matter how long it persists.

10 In an obvious attempt to run up the penalty number, BCDC staff have counted each asserted
11 violation as many violations. Of most significance, they have over counted the alleged violations of the
12 permit condition “authorizing the construction of a 4,400-square-foot pavilion in the plaza to be used
13 for public access purposes eighty percent *of each year* (292 days)”. (Permit at 7, emphasis added.)
14 Staff alleges that the 292-day-per-year number was not complied with in ten years: 2004 through 2008,
15 and 2010 through 2014. (Complaint at 9-17.) At \$1,000 per violation, that would be a \$10,000 penalty.
16 But Staff has imposed a separate penalty for each of 374 days, and therefore proposes a penalty of more
17 than \$374,000. (The actual proposal is for \$374,180; it is not clear where the last \$180 comes from.)

18 The table prepared by BCDC staff makes clear that they are counting *days*. They insist that
19 each day is a new violation. But the statute makes clear that although a penalty can be imposed for each
20 day in which the violations occurs, the total for that violation must be less than \$30,000:

21 Civil liability may be administrative imposed...for each day in which that
22 violation *occurs* or persists, but the commission may not administratively impose
23 a fine of more than thirty thousand dollars (\$30,000) for a single violation.

24 (Gov. Code § 66641.5(e), emphasis added.)

25 Here the alleged violation of the 292-day-per-year number may have *occurred or persisted* for
26 many days each year, but the exceedance of a per-year limit can only, under this statute, be a single
27 violation. By counting a single asserted violation as many violations, staff are violating the very act
28 that they are supposed to be enforcing.

The other alleged violations asserted by the BCDC staff are over counted in the same way. The
Legislature plainly did not intend that the \$30,000 limit would be no limit at all, because BCDC would

1 run up the count by asserting that each incidence was a separate violation. If Scott's has made a few
2 minor modifications to a permitted structure, that should be counted as a single violation (or, more
3 properly, as explained above, no violation at all) rather than four violations. If Scott's has made
4 unauthorized public use of the plazas, that should also be counted as a single violation, rather than 394
5 violations. BCDC staff is plainly alleging a continuing violation, which brings it squarely within the
6 statutory provision allowing a penalty to be imposed for each day as long as the total is not more than
7 \$30,000.

8 Furthermore, the BCDC fails to take into account the important distinction between Scott's
9 private, for-profit events, and the charitable events that Scott's operated either at cost or for free as a
10 charitable donation. The permit specifically allows Scott's to hold private events on 73 days per year.
11 As the permit does not define "private," it should be interpreted in the most logical sense, as events that
12 are the same as Scott's would hold in their private, for-profit restaurant.

13 What should not be counted against the 73 "private" days are events in which members of the
14 public have used the pavilion for their community-based, non-profit events. As it happens, under the
15 permit, Scott's is responsible for maintaining and managing the pavilion, and is thus the only restaurant
16 that can operate the pavilion and assist with these community events. However, Scott's should not be
17 punished simply because a member of the public required a caterer for their event; rather, it would be
18 inappropriate for Scott's to effectively block a member of the public from using the pavilion by refusing
19 to service their event.

20 The BCDC should note the important difference, particularly when honoring the goals of the
21 McAteer-Petris Act. By assisting community groups with their events, Scott's is enabling more people
22 – thousands per year from charitable events alone – to come to the Oakland waterfront and enjoy the
23 beautiful scenery. By generously donating time and energy and working either for free or at cost,
24 Scott's is clearly facilitating the public's use of the pavilion, not engaging in "private use." As a result,
25 these days should not be considered private use days or count against the 73 annual days allotted under
26 the permit. By removing these days, the BCDC's alleged violations of annual overuse will shrink
27 dramatically, as will the individual violations for consecutive days, excessive weekend events, and all
28 allegations of private overuse. Overall, the Commission has grossly over counted the alleged

1 violations.

2 **E. THE STATUTE OF LIMITATIONS HAS RUN**

3 Government Code § 66641.5 authorizes penalties against persons who violate the McAteer-
4 Petris Act or a permit issued by BCDC. Subsections (a) through (d) provide for penalties that can be
5 imposed only by a court of law. Subsection (e), however, allows for administrative penalties:

6 Civil liability may be administratively imposed by the commission...on
7 any person or entity for any violation of this title or any term or condition
8 of a permit issued by or on behalf of the commission....

8 Here BCDC is being asked to impose administrative penalties in accordance with this section.

9 The statute of limitations for penalty to a state agency is one year:

10 Within one year: (b) An action upon a statute for a forfeiture or
11 penalty to the people of this state.

12 (CCP § 340(b).) This one-year statute of limitations also applies to administrative penalties. (*See*
13 *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1395-1396 (“[a]bsent explicit statutory
14 language to the contrary, common sense would suggest that, where the Legislature has set forth a statute
15 of limitations in one part of a statute, the prescribed limitations period governs the filing of actions
16 provided for in another part of the same statute”).) Here common sense suggests that when the
17 Legislature imposed a one-year statute of limitations on Government Code § 66641.5 subsections (a)
18 through (d), it also intended that same statute of limitations to apply to subsection (e).

19 The complaint in this matter is unsigned and undated, but it was accompanied by a transmittal
20 letter dated December 19, 2016. The statute of limitations therefore prohibits BCDC from penalizing
21 activity that took place before December 19, 2015.

22 Almost all of the alleged violations identified in the complaint took place before that date.
23 Allegations of events after that date appear to include only the placement of planters and other items in
24 Franklin Street Plaza, and the submission of quarterly calendars of events. (Complaint at 20-21, ¶¶
25 VII.G.3.t-VII.G.3.w, and at 22, ¶ VII.H3.a.4.) Because the statute of limitations has run, every other
26 alleged violation should be dismissed.

27 **F. THE PENALTY WILL BE INVALID BECAUSE A HEARING WILL NOT HELD**
28 **BEFORE THE FULL COMMISSION WITHIN 60 DAYS**

Government Code § 66641.5(e), which authorizes penalties against persons who violate the

McAteer-Petris Act or a permit issued by BCDC, specifies that the penalties must be imposed in accordance with §66641.6: “Civil liability may be administratively imposed by the commission in accordance with Section 66641.6....” That section, in turn, requires that the hearing be held *by the Commission*:

The executive director of the commission may issue a complaint to any person or entity on whom administrative civil liability may be imposed pursuant to this article.

The complaint...shall inform the party so served that a hearing shall be conducted within 60 days after the party has been served. The hearing shall be before the commission.

(Gov. Code § 66641.6(a)-(b).)

The complaint in this matter identifies February 17, 2017 as 60 days after mailing, and specifies a hearing date of February 16, 2017. (Complaint at 1.) But, as the transmittal letter makes clear, the hearing is not before the Commission. Rather, it is before the Enforcement Committee. (Transmittal letter at 2.) According to the cover letter, “[t]he full Commission will make the final determination whether to issue a cease and desist and civil penalty order after the Enforcement Committee’s public hearing and after considering the Enforcement Committee’s recommended enforcement decision.” (*Id.*) Plainly, the hearing before the full Commission will not be “within 60 days after the party has been served”, as required by § 66641.6(b). Any penalty imposed after 60 days will not be in compliance with the statute, and will therefore be invalid.

G. THE PROCEDURE VIOLATES DUE PROCESS

Due process requires agencies to separate advocates from decision makers, and prohibits ex parte communications between them:

While the state’s administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker’s advisers in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5; *see also* Gov. Code § 11425.10 (Administrative Adjudication Bill of Rights).)

Alcoholic Beverage Control reaffirmed the separation and ex parte rules applied by a line of cases reaching back to at least 1950. (*See English v. City of Long Beach* (1950) 35 Cal.2d 155, 159

1 (holding that an administrative board deprived a person of a fair trial when its decision was based on
2 ex parte communications “of which the parties were not apprised and which they had no opportunity to
3 controvert”); *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587 (holding that
4 “performance of both roles [i.e. advocate for a party and adviser to the tribunal] by the same law office
5 is appropriate only if there are assurances that the advisor for the decision maker is screened from any
6 inappropriate contact with the advocate”); *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003)
7 108 Cal.App.4th 81, 93, 98 (confirming that “it is improper for the same attorney who prosecutes the
8 case to also serve as an advisor to the decision maker”, and holding that when an advocate acted as
9 legal advisor to a hearing officer he violated due process); *Quintero v. City of Santa Ana* (2003) 114
10 Cal.App.4th 810, 812, 815 (holding that there was a “clear appearance of bias and unfairness” that
11 violated due process when a deputy city attorney represented a party in proceedings before the Board in
12 two unrelated cases, and then represented the Board itself in proceedings on “a writ petition in the
13 superior court”).)

14 In *Quintero*, the court of appeal overturned an agency action because of a “clear appearance of
15 bias and unfairness”. (*Quintero*, 114 Cal.App.4th at 812.) *Quintero* found that Hugh Halford, a deputy
16 city attorney, played a “dual role”. (*Id.* at 815.) He, like the prosecutors here, represented a party in
17 proceedings before the Board, and then represented the Board itself in proceedings on “a writ petition in
18 the superior court”. (*Id.*)

19 *Quintero* concluded that this dual role created an unacceptable risk of bias:

20 [A] prosecutor, by definition, is a partisan advocate for a particular position or
21 point of view. Such a role is inconsistent with the objectivity expected of
22 administrative decision makers. Accordingly, to permit an advocate for one party
23 to act as the legal adviser for the decision maker creates a substantial risk that the
24 advice given to the decision maker will be skewed, particularly when the
25 prosecutor serves as the decision maker’s adviser in the same or a related
26 proceeding.

27 (*Id.* at 871, quoting *Nightlife*, 108 Cal.App.4th at 93, citations omitted.)

28 For the Board to allow its legal adviser to also act as an advocate before it creates
a substantial risk that the Board’s judgment in the case before it will be skewed in
favor of the prosecution. The chance that the Board will show a preference
toward Halford, even “perhaps unconsciously” is present and unacceptable.

(*Id.*, quoting *Howitt*, 3 Cal.App.4th at 1585.)

The State Board Water Resources Control Board imposes a strict separation between the

1 members of the prosecution and advisory teams:

2 The hearing officer and the other [State] Board members treat the enforcement team “like any
3 other party.” Agency employees assigned to the enforcement team are screened from
4 inappropriate contact with Board members and other agency staff through strict application of
5 the state Administrative Procedure Act’s rules governing ex parte communications. (Gov. Code,
6 § 11430.10 et seq.) “In addition, there is a physical separation of offices, support staff,
7 computers, printers, telephones, facsimile machines, copying machines, and rest rooms between
8 the hearing officer and the enforcement team (as well as the hearing team),” according to the
9 Whitney declaration.

10 (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 735-
11 736.)

12 BCDC’s regulations, and the procedure used in this penalty proceeding, violate the requirement
13 for separation of functions. The BCDC Executive Director issued the Complaint. That makes him a
14 member of the prosecution team in this matter. But BCDC regulations call for him to prepare a
15 “recommended enforcement decision” (14 Cal. Code. Regs. §§ 11324, 11326), which is the province of
16 the advisory team and the decision-makers.

17 Because the Executive Director is given this special role, he is not being treated “like any other
18 party”. (*Morongo* at 735.) He is given the role of a special (and esteemed) advisor to the enforcement
19 committee. But, as noted in *Quintero* and *Nightlife*, a “prosecutor, by definition, is a partisan advocate
20 for a particular position or point of view’ and that “role is inconsistent with the objectivity expected of
21 administrative decision makers.” (Quoted in full above.) That lack of separation of functions “creates a
22 substantial risk that the [decision-maker’s] judgment in the case before it will be skewed in favor of the
23 prosecution”, which is “unacceptable”. (Quoted in full above.) Because the enforcement committee
24 members will be inclined to follow the recommendation of the Executive Officer, who is a member of
25 the prosecution team, the regulation violates the requirement for separation of functions, and violates
26 the Constitutional requirement for a trial that is fair, and also appears to be fair.

27 The separation-of-functions requirements was also violated because the Executive Director,
28 acting on behalf of the Commission, issued a records subpoena. The Executive Director is a member of
the prosecution team in this case, and should not have acted on behalf of the Commission, which is the
decision-maker. Scott’s does not have authority, under the Commission rules, to issue a subpoena. The
prosecution team’s issuance of the subpoena showed that it is not subject to the rules like any other

1 party, but rather has the unfair advantage of acting on behalf of the Commission.

2 **H. THE PENALTY IS SIMPLY TOO MUCH**

3 As discussed in detail above, the \$841,180 penalty is far too much for this case and is
4 unsupported. The chart, attached to the Declaration of Michael P. Verna as Exhibit A (and also as
5 Exhibit A to this statement) proves Scott's point.

6 **VII. CONCLUSION**

7 For the foregoing reasons, Scott's respectfully believes that the Violation Report/Complaint lack
8 substantial evidence and are otherwise legally deficient. And if the BCDC issues an enforcement order
9 based thereon, it will be abusing its discretion, acting without substantial evidence to support its
10 decision, and assessing a civil penalty that is arbitrary and capricious.

11
12
13 Dated: January 23, 2017

BOWLES & VERNA LLP

14
15 By: 

16 MICHAEL P. VERNA
17 LAWRENCE D. GOLDBERG
18 DANIEL J. ZARCHY
19 Attorneys for
20 SCOTT'S JACK LONDON SEAFOOD, INC
21
22
23
24
25
26
27
28